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THE
LAW REPORTS
1957

House of Lords
and
Judicial Committee of the Privy Council
and
Peerage Cases

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1957

MEMORANDA

1957.

Jan. 5. THE RIGHT HON. SIR (WILLIAM) NORMAN BIRKETT, *Lord Justice of Appeal since* 1950, *retired.*

Jan. 6. THE RIGHT HON. SIR JOHN EDWARD SINGLETON, *a Lord Justice of Appeal since* 1948, *died.*

Jan. 11. THE HON. SIR FREDERIC AKED SELLERS, M.C., *a Justice of Her Majesty's High Court of Justice, Queen's Bench Division, was appointed to be one of the Lords Justices of Appeal in succession to Lord Justice Birkett, and was made a Privy Councillor.*

Jan. 11. GEORGE RAYMOND HINCHCLIFFE, ESQ., Q.C., *was appointed to be one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division, and a knighthood was conferred upon him.*

Jan. 14. SIR HARRY HYLTON-FOSTER, Q.C., M.P., *was made a Privy Councillor.*

Jan. 21. THE HON. SIR BENJAMIN ORMEROD, *a Justice of Her Majesty's High Court of Justice, Queen's Bench Division, was appointed to be one of the Lords Justices of Appeal in succession to the late Lord Justice Singleton.*

Jan. 23. GILBERT JAMES PAULL, ESQ., Q.C., *was appointed to be one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division, and a knighthood was conferred upon him.*

Feb. 8. MR. JUSTICE GORMAN *was appointed the Judge for hearing appeals from the Pensions Appeal Tribunals.*

Apr. 5. THE RIGHT HON. LORD OAKSEY, D.S.O., *a Lord of Appeal in Ordinary since* 1947, *resigned.*

Apr. 24. THE RIGHT HON. SIR ALFRED THOMPSON DENNING, *a Lord Justice of Appeal since* 1948, *was created a Lord of Appeal in Ordinary with the style and title of Baron Denning of Whitchurch in the County of Southampton, in succession to Lord Oaksey.*

Apr. 30. THE HON. SIR HOLROYD PEARCE, *a Justice of Her Majesty's High Court of Justice, Queen's Bench Division, was appointed to be one of the Lords Justices of Appeal and was sworn a member of the Privy Council.*

Apr. 30. CYRIL BARNET SALMON, ESQ., Q.C., *was appointed to be one of the Justices of Her Majesty's High Court, Queen's Bench Division, and a knighthood was conferred upon him.*

Aug. 16. THE RIGHT HON. EARL JOWITT, *sometime Lord Chancellor, died.*

Aug. 22. LORD HILL WATSON, *one of the Senators of Her Majesty's College of Justice in Scotland, died.*

Sept. 27. C. W. GRAHAM GUEST, ESQ., Q.C., *Dean of the Faculty of Advocates, was appointed one of the Senators of Her Majesty's College of Justice in Scotland in succession to the late Lord Hill Watson.*

Sept. 30. THE HON. SIR HUGH IMBERT PERIAM HALLETT, M.C., *a Justice of Her Majesty's High Court of Justice, Queen's Bench Division, since* 1939, *retired.*

Oct. 1. AUBREY MELFORD STEED STEVENSON, ESQ., Q.C., *was appointed to be one of the Justices of Her Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, and a knighthood was conferred upon him.*

Dec. 19. THE HON. MR. JUSTICE OLIVER, *a Justice of Her Majesty's High Court of Justice, Queen's Bench Division, since* 1938, *retired.*

Dec. 21. THE HON. MR. JUSTICE LYNSKEY, *a Justice of Her Majesty's High Court of Justice, Queen's Bench Division, since* 1944, *died, aged* 69.

Dec. 29. THE HON. SIR REGINALD CROOM-JOHNSON, *a Justice of Her Majesty's High Court of Justice, Queen's Bench Division, from* 1938 *to* 1954, *died, aged* 78.

At varying dates during the year the following Judges were nominated to the Restrictive Practices Court: MR. JUSTICE DEVLIN (*President*), MR. JUSTICE UPJOHN, MR. JUSTICE PEARSON, MR. JUSTICE MCVEIGH (*Northern Ireland*) *and* LORD CAMERON *in place of* LORD HILL WATSON (*since deceased*) (*Scotland*).

The Mode of Citation of the Volumes of the *Law Reports* for 1957, is as follows:—

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Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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Foscolo, Mango & Co. Ltd. *v.* Stag Line Ltd.	38 Ll.L.Rep. 271; [1931] 2 K.B. 48; 47 T.L.R. 278		156
Foster *v.* Driscoll	[1929] 1 K.B. 470; 45 T.L.R. 185		614
Francesco *v.* Costa	48 S.C.C. 189	*Appl.*	177, 194
Frenkel *v.* MacAndrews & Co. Ltd.	[1929] A.C. 545; 45 T.L.R. 311	*R.*	164
Fry *v.* Burma Corporation	[1930] A.C. 321		49
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Gardner, Mountain and D'Ambrumenil Ltd. *v.* Inland Revenue Commissioners	177 L.T. 16; [1947] 1 All E.R. 650	*R.*	354
Gas Lighting Improvement Co. Ltd. *v.* Inland Revenue Commissioners	[1923] A.C. 723; 39 T.L.R. 504		41
General Medical Council *v.* Spackman	[1943] A.C. 627; 59 T.L.R. 412; [1943] 2 All E.R. 337		497

George Wimpey & Co. Ltd. *v.* British Overseas Airways Corporation	[1955] A.C. 169; [1954] 3 All E.R. 661	*R.*	570
Glasgow Assessor *v.* Gilmartin	1920 S.C. 488	*Appl.*	362, 373, 385
Glynn *v.* Margetson & Co.	[1893] A.C. 351; 9 T.L.R. 437	*Dist.*	150, 164, 168, 174
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Goold *v.* Evans & Co.	[1951] 2 T.L.R. 1189	*R.*	484
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Gosse Millard *v.* Canadian Government Merchant Marine Ltd.	[1927] 2 K.B. 432; 44 T.L.R. 143	*R.*	166
Grace Bros. Pty. Ltd. *v.* Commonwealth of Australia	[1951] A.C. 53	*R.*	27
Green *v.* Lord Penzance	6 App.Cas. 657		215
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Gregory *v.* Duke of Brunswick	1 C. & K. 24		610
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Gunatilleke *v.* Fernando	21 N.L.R. 257		120
Gunatilleke *v.* Fernando	22 N.L.R. 385		190
Hadji Ali Akbar *v.* Anglo-Arabian and Persian Steamship Co.	95 L.T. 610; 22 T.L.R. 600		152
Halton *v.* Cove	1 B. & Ad. 538		442
Hanson *v.* Radcliffe U. D. C.	[1922] 2 Ch. 490; 38 T.L.R. 667		497
Hansson *v.* Hamel & Horley Ltd.	[1922] 2 A.C. 36; 38 T.L.R. 466		152
Hanumantha Gowd *v.* Official Receiver, Bellary	A.I.R. (1946) Mad. 503		533
Harmer *v.* Cornelius	5 C.B.N.S. 236	*R.*	572, 597
Harrison *v.* Goodland	69 C.L.R. 509		303
Harrison *v.* John Cronk & Sons Ltd.	[1937] A.C. 185; 153 L.T. 366; 53 T.L.R. 154; [1936] 3 All E.R. 747	*R.*	355, 356
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Hassam Mahamed *v.* The Queen	Court of Criminal Appeal of British Guiana, No. 17 of 1954	*R.*	483
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Hindu Women's Rights to Property Act, 1937, *In re*	A.I.R. (1941) Fed. Ct. 72		525
Hirsch Lumber Co. *v.* Weyerhaeuser Steamship Co.	1956 A.M.C. 1294	*R.*	171
H.M. Advocate *v.* Dogherty	1954 S.L.T. 169; 1954 S.C.(J.) 1		639
Hobson *v.* Gorringe	[1897] 1 Ch. 182; 13 T.L.R. 139	*R.*	377
Hodge *v.* The Queen	9 App.Cas. 117		299
Hodson's Settlement, *In re*	[1939] Ch. 343; 55 T.L.R. 357		526
Holland *v.* Hodgson	L.R. 7 C.P. 328	*R.*	372, 376, 377
Hollenden *v.* F. Hewthorne & Co. Ltd.	[1943] K.B. 587; 59 T.L.R. 321; [1943] 2 All E.R. 35		561
Holmes *v.* Director of Public Prosecutions	[1946] A.C. 588; 62 T.L.R. 466		640

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Howard *v.* Shaw	8 M. & W. 118		419
Huddart, Parker & Co. Pty. Ltd. *v.* Moorehead	8 C.L.R. 330	*R.*	319
Huddersfield Banking Co. Ltd. *v.* Henry Lister & Son Ltd.	[1895] 2 Ch. 273		191
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Ibrahim *v.* The King	[1914] A.C. 599; 30 T.L.R. 383	*R.*	487
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Inland Revenue *v.* Western Steamship Co. Ltd.	1907 S.C. 1005		341
Inland Revenue Commissioners *v.* Butterley Co. Ltd.	[1955] Ch. 453; [1955] 1 All E.R. 891	*Aff.*	33
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Inland Revenue Commissioners *v.* Gas Lighting Improvement Co. Ltd.	[1922] 2 K.B. 381; 38 T.L.R. 613		40
Inland Revenue Commissioners *v.* Glasgow and South-Western Railway Co.	12 App.Cas. 315		407
Inland Revenue Commissioners *v.* Korean Syndicate Ltd.	[1920] 1 K.B. 598; 36 T.L.R. 179; [1921] 3 K.B. 258; 37 T.L.R. 735		43
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Institute of Patent Agents *v.* Lockwood	[1894] A.C. 347; 10 T.L.R. 527		216
Isaac Holden & Sons Ltd. *v.* Inland Revenue Commissioners	12 T.C. 768	*R.*	354
Istros (Owner) *v.* F. W. Dahlstroem & Co.	[1931] 1 K.B. 247		153
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James Spencer & Co. *v.* Inland Revenue Commissioners	1950 S.C. 345; 32 T.C. 111	*R.*	357
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John Laing & Son Ltd. *v.* Kingswood Assessment Committee	[1948] 2 K.B. 116; 64 T.L.R. 407; [1948] 1 All E.R. 943; [1949] 1 K.B. 344; 65 T.L.R. 80; [1949] 1 All E.R. 224	*Appl.*	362, 369, 370, 373, 381
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John T. Ellis Ltd. *v.* Hinds	[1947] K.B. 475; 63 T.L.R. 181; [1947] 1 All E.R. 337	*R.*	582, 593
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Johnson (B.) & Co. (Builders) Ltd. *v.* Minister of Health	177 L.T. 455; [1947] 2 All E.R. 395	*R.*	510
Johnston, Fear & Kingham & Offset Printing Co. Pty. Ltd. *v.* The Commonwealth	67 C.L.R. 314		300
Jones *v.* Commonwealth Court of Conciliation and Arbitration	[1917] A.C. 528; 33 T.L.R. 358	*C.*	2, 25
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Kirkness *v.* John Hudson & Co. Ltd.	[1955] A.C. 696; [1955] 2 All E.R. 345	*C.*	325, 332
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Newcastle Breweries Ltd. *v.* Inland Revenue Commissioners	96 L.J.K.B. 735; 43 T.L.R. 476	*R.*	354
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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL

J. C.*

1956
July 4.

THOMAS O'SULLIVAN . . . . . . APPELLANT;

AND

NOARLUNGA MEAT LTD. . . . . . RESPONDENT.

COMMONWEALTH OF AUSTRALIA, STATE OF NEW SOUTH WALES AND STATE OF TASMANIA . . . . INTERVENERS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Appeal to Privy Council—Jurisdiction—Federal and State laws governing same matter—Plea of inconsistency under section 109 *of Commonwealth Constitution—Question not between powers but between laws made under powers—Not an inter se question—Appeal competent — Test of "inconsistency" — Paramount intention to legislate exhaustively or exclusively — Metropolitan and Export Abattoirs Act,* 1936–1952 (*S.A.*), *s.* 52*a—Commerce* (*Meat Export*) *Regulations* (*as amended to S.R. No.* 36 *of* 1953) (*Commonwealth*) *—Customs Act,* 1901–1953, *s.* 270 (*c*) (*Commonwealth*)*—Commonwealth of Australia Constitution,* 1900 (63 *&* 64 *Vict. c.* 12), *ss.* 74, 109.

By section 74 of the Commonwealth of Australia Constitution: "No appeal shall be permitted to the Queen in Council from a

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD COHEN, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

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"decision of the High Court upon any question, howsoever arising, "as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States . . . unless the High "Court shall certify that the question is one which ought to be "determined by Her Majesty in Council . . ."

A summons having been issued against the respondent company for using its premises for slaughtering stock for export as fresh chilled or frozen meat without a licence to use the premises for that purpose contrary to section 52a of the Metropolitan and Export Abattoirs Act, 1936–1952, of the State of South Australia, the company contended that section 52a was inconsistent with the Commonwealth Commerce (Meat Export) Regulations under and in compliance with which the company's premises were duly registered for the slaughtering of stock for export, and that section 52a was therefore invalid under section 109 of the Commonwealth Constitution, which provided that "When a law of a State is inconsistent "with a law of the Commonwealth, the latter shall prevail, and "the former shall, to the extent of the inconsistency, be invalid."

A preliminary objection having been first taken by the respondent company and by the Commonwealth of Australia (intervener) to the jurisdiction of the Board on the ground that all the issues in the case, including the question of "inconsistency" and the question whether the regulations were intra vires the Customs Act, 1901–1953, under which they were purported to be made, raised questions as to the limits inter se of the constitutional powers of the Commonwealth and the State of South Australia within the meaning of section 74 of the Commonwealth Constitution and accordingly could not be entertained by the Board in the absence, as was the case here, of a certificate of the High Court of Australia:—

Held, that it was the extent of the power that must be in debate in order to raise an inter se question, and a question of inconsistency under section 109 of the Constitution was a question not between powers but between laws made under powers. The plea of inconsistency between the Commerce (Meat Export) Regulations—a Commonwealth law—and section 52a of the Metropolitan and Export Abattoirs Act—a State law—under section 109 of the Constitution did not therefore involve an inter se question and the Board accordingly had jurisdiction to entertain the appeal. On the same principle the preliminary objection failed on the issue whether the regulations were intra vires the Customs Act.

The Board had not in *Jones* v. *Commonwealth Court of Conciliation and Arbitration* [1917] A.C. 528; 33 T.L.R. 358; *Commonwealth of Australia* v. *Bank of New South Wales* [1950] A.C. 235; 65 T.L.R. 633; [1949] 2 All E.R. 755 and *Nelungaloo Pty. Ltd.* v. *Commonwealth of Australia* [1951] A.C. 34 expressed a view which demanded a fresh approach to this inter se question from that stated above.

O'Sullivan v. *Noarlunga Meat Ltd.* (not reported) (judgment of the High Court of Australia on the application for a certificate in the present case) approved and applied. Dictum of Dixon J. in *Nelungaloo Pty. Ltd.* v. *The Commonwealth of Australia* (1952) 85 C.L.R. 545, 577 approved.

"Inconsistency" depended on the intention of the paramount legislature to express by its enactment completely, exhaustively or exclusively what should be the law governing the particular conduct or matter to which its attention was directed, and when a Federal law disclosed such an intention it was inconsistent with it for the law of a State to govern the same matter.

Ex parte McLean (1930) 43 C.L.R. 472, 483 approved.

Held, secondly, that section 52a was not part of a general slaughtering code, but was a special condition confined to the use of premises for slaughtering for export, and such special conditions were precisely the field which the regulations evinced an intention exhaustively to cover, and the section was therefore inconsistent with the regulations and invalid and inoperative.

Held, further, that the regulations were within the power conferred by section 270 (*c*) of the Customs Act, which provided that "The Governor-General may make regulations . . . for prescribing "—. . . (*c*) the conditions of preparation or manufacture for "export of any articles used for food . . . ," and the power to prescribe conditions under that section covered the ouster of the condition imposed by section 52a.

Judgment of the High Court of Australia (1955) 92 C.L.R. 565 affirmed.

APPEAL (No. 8 of 1956), by special leave, from an order of the Full Court of the High Court of Australia (December 17, 1954) on a special case stated for the opinion of the Supreme Court of South Australia and removed into the High Court of Australia under section 40a of the Judiciary Act, 1903–1950, of the Commonwealth of Australia.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The appellant was an inspector of police of the State of South Australia. On March 18, 1954, a complaint and summons was issued at Adelaide in his name against the respondent for using its premises for slaughtering meat for export contrary to the provisions of section 52a of the Metropolitan and Export Abattoirs Act, 1936–1952—a State Act. The magistrate reserved for the consideration of the Supreme Court of South Australia a question of law and stated a special case. The question of law was "Whether section 52a "of the Metropolitan and Export Abattoirs Act, 1936–1952, is a "valid and operative enactment." An agreed statement of facts was attached. The special case was referred by the Supreme Court to the High Court under section 40a of the Judiciary Act, 1903–50. The order for the removal of the case was made on June 16, 1954, under section 40 of the Judiciary Act. The Commonwealth and the States of New South Wales and Tasmania obtained leave to intervene.

Section 52a was as follows: " (1) No person shall in any part " of the State outside the Metropolitan Abattoirs Area use any " premises for the purpose of slaughtering stock for export as " fresh meat in a chilled or frozen condition unless he is the " holder of a licence from the Minister of Agriculture authorizing " him to use those premises for that purpose.

" Any person who contravenes this subsection shall be guilty " of an offence and liable to a fine not exceeding one hundred " pounds and in the case of a continuing offence to an additional " fine not exceeding twenty pounds for every day on which the " offence continues.

" (2) The Minister of Agriculture shall have a discretion to " grant or refuse any application for a licence under this section " after due consideration of the following matters:—(*a*) whether " the applicant is a fit and proper person to hold a licence under " this section; and (*b*) whether the place where it is proposed to " establish the premises to be used under the licence is a suitable " place for the establishment of such premises; and (*c*) whether " the premises are necessary to meet the requirements of the " public: Provided that the Minister shall not refuse an application for such a licence if the premises for which the licence is " required are to be erected at least eighty miles from all " premises, existing at the date of such application, and established within the State for the purpose of slaughtering stock " for export as aforesaid.

" (3) Every licence shall be for such period and contain such " restrictions, terms and conditions as the Minister thinks proper.

" (4) This section shall not apply to the Government Produce " Department."

The respondent had used its premises for slaughtering stock for export and had no licence from the Minister of Agriculture as required by section 52a. The respondent submitted that section 52a was inconsistent with the Commonwealth Commerce (Meat Export) Regulations and therefore invalid under section 109 of the Constitution, which provides that: " When a law of a State " is inconsistent with a law of the Commonwealth, the latter " shall prevail, and the former shall, to the extent of the inconsistency, be invalid." Under the regulations the export of meat was prohibited unless the premises at which it was slaughtered had been registered. The respondent's slaughterhouse was registered as an establishment in which slaughtering for export could be conducted. On this question the High Court (Dixon C.J., McTiernan, Webb, Fullagar, Kitto and Taylor JJ.)

was equally divided and the opinion of Dixon C.J., who held that there was inconsistency, prevailed under section 23 of the Judiciary Act. The Chief Justice and Kitto J. agreed with the judgment of Fullagar J.

The appellant, who submitted that there was no inconsistency, further submitted that the regulations, if "inconsistent" on their true construction with section 52a, were (a) ultra vires the power to make regulations conferred by the Customs Act, and (b) ultra vires the legislative power of the Parliament of the Commonwealth conferred by section 51 (i) of the Constitution.

Dixon C.J., Fullagar J. and Kitto J. held that (1) the regulations were within the regulation making power of the Customs Act, and (2) were not outside the legislative powers of the Commonwealth. It was common ground that this last point was one as to the limits inter se of the constitutional powers of the Commonwealth and those of the States within section 74 of the Constitution.

It was therefore held that section 52a was not a valid and operative enactment and the prosecution failed.

By an Order in Council dated June 21, 1955, the appellant was given leave to appeal "save as to any question as to the "limits inter se of the constitutional powers of the Common"wealth and the State." The appellant applied to the High Court for a certificate under section 74 of the Constitution. On March 2, 1956, the application was refused.

On May 7, 1956, the respondent lodged a petition asking that the appeal should be dismissed on the ground that the appellant in his case had abandoned important contentions as stated when leave to appeal was granted and that the issues remaining were not of sufficient importance to justify leave to appeal.

A preliminary objection to the jurisdiction of the Board to hear this appeal was taken by the respondent company and by the Commonwealth of Australia, intervening, who submitted that all the issues in the case, including the question of "inconsistency" and the question whether the regulations were intra vires the Customs Act, raised questions as to the limits inter se of the constitutional powers of the Commonwealth and the State of South Australia within the meaning of section 74 of the Constitution.

1956. May 9, 10, 14, 15, 16, 17. *H. G. Alderman Q.C.* (Australia) and *Ian Baillieu* for the respondent company, dealing with the petition for dismissal of the appeal, which was called on first. The general proposition forming the basis of this petition is that when special leave to appeal has been granted, and it appears subsequently that the substantial question involved is beyond the jurisdiction of this Board, it is always open to the Board to hold that the residue of the matters in their jurisdiction do not involve matters of sufficient importance to justify the granting of special leave to appeal, and such special leave should be rescinded.

Except for a point of relatively minor importance, viz., whether these particular regulations "cover the field," the appeal cannot be argued without constantly returning to an inter se question. Counsel at the hearing of the petition for special leave to appeal conceded that he could not dispute the High Court decision on the "export" power without a certificate of the High Court, but that a most important point, i.e., the meaning and application of section 109, did not raise an inter se question and did not require a certificate under section 74 of the Constitution. A certificate has since been refused and on that application one judge of the High Court decided definitely, and the majority suggested, that since the Judicial Committee had decided that all section 52 questions are inter se, section 109 also raises an inter se question. It is for the Judicial Committee to decide that question finally. If it is an inter se question, the Board has no power to deal with it and the respondent is entitled to know now what is the scope of the appeal and not have to debate the whole matter to find that out at the end of the appeal.

The attack of the appellant on the meaning—as distinct from the application—of section 109 adopted by the High Court has been abandoned in the appellant's printed case, but the High Court's application of section 109 is attacked. That raises an inter se point because one cannot apply section 109 without first deciding actually or notionally whether the challenged Commonwealth law is valid under section 52 of the Constitution. The decision as to the application of it defines the line between the State and Commonwealth powers and either advances or limits State power accordingly.

If the application of section 109 does raise an inter se point, then what is left of this appeal is not proper to be considered by this Board.

The respondent has complied with every State law relating to health, sanitation, building, town planning and local government, and therefore in this matter no question arises as to whether and to what extent the Commonwealth can override such laws.

D. I. Menzies Q.C., *R. R. St. C. Chamberlain Q.C.* (both of Australia) and *R. A. Gatehouse* for the appellant. The jurisdiction of the Board to rescind special leave in special circumstances is, of course, conceded. The Board on the hearing of the petition for special leave were made fully aware that there was an important inter se question involved, and they said that they could not of course deal with that without a certificate and would have to consider the merits of the appeal independently of any inter se question, and there was a form of order to exclude any inter se question. The mere fact that there are inter se questions is no reason whatever for rescinding the leave. The remaining matters are substantial. What the appellant is concerned with is the determination of the High Court that there is no room for any State law which deals with this topic of slaughtering for export, and that any State law, whether section 52a or anything else, is invalid. The appellant accepts the test of " inconsistency " as stated in the judgment of the High Court in the present case, and says that applying that test the Commerce (Meat Export) Regulations upon their proper construction are not an exhaustive and exclusive law in relation to slaughtering for export. That leaves what is the true scope and meaning of the regulations. Special leave was properly granted and it should not now be rescinded.

[It was directed that the hearing of the appeal should proceed.]

D. I. Menzies Q.C. This, a test case, raises an important constitutional question. The only defence was that section 52a was invalid. The main issues in the case are: (a) Whether the Commerce (Meat Export) Regulations of the Commonwealth are a valid exercise of the powers conferred by the Customs Act, 1901–1951, of the Commonwealth; (b) whether section 52a of the State Act is inconsistent with the Commonwealth regulations, if valid, and therefore invalid by reason of section 109 of the Constitution; and (c) whether the meaning and application of section 109 of the Constitution is a question as to the limits inter se of the constitutional powers of the Commonwealth and those of the States within the meaning of section 74 of the Constitution. The appellant is, of course, only entitled to argue questions which do not involve inter se questions, the High Court having refused a certificate under section 74. That leaves two questions which, it is contended, now fall for decision; and the appellant's submissions on the merits of the case are (1) that the Commonwealth regulations are not authorized by the Customs Act, and (2) that upon the proper construction of these regulations there is no inconsistency between them and section 52a. If the regulations are interpreted so as to be inconsistent with section 52a of the Act they are not authorized by section 270 of the Customs Act. If the regulations do prescribe completely and exhaustively the requirements of the law with respect to premises for slaughtering for export, then they are outside the statutory authority. If they do not, and it is submitted that they do not, then there is no inconsistency. The general scheme of the State legislation with regard to the slaughtering of stock taken as a whole supports the above submissions.

The regulations are not enabling, they are restrictive. The consequences of failing to comply with them is that the offender will not be able to export. No part of this argument is directed to reducing Commonwealth power. The regulations are not concerned with the person; the Commonwealth is not concerned with the location of the establishment in relation to transport facilities. All these regulations are merely for sanitary purposes. It was not the intention of the Commonwealth to occupy the whole field: see regulation 103, which provides that where by the law of any State any goods are required to be inspected and approved by a State authority before export, and the Minister is satisfied that such inspection and approval are as efficient as inspection and markings under these regulations, the Minister may direct that such inspection and approval shall be accepted, wholly or partly in lieu of examination and marking under the regulations. That yields the inference that the regulations are intended to be, and are, cumulative upon and supplementary to, State law; it is a clear indication of the possibility of concurrent State regulations.

The Slaughtering Ordinance, No. 14 of 1955, in relation to the Northern Territory—where only Commonwealth legislation runs—and made under the authority of a Commonwealth Act, is relied on as showing that in its own sphere the Commonwealth thought it necessary to have regulations which governed slaughtering of animals that are far more restrictive than the Commerce (Meat Export) Regulations; and that is inconsistent with the earlier regulations being regarded as the only law on this topic. There are in the Ordinance of the Northern Territory laws corresponding to section 52a, which again indicates that the Commerce (Meat Export) Regulations are not complete and exhaustive on the subject of slaughter for export. Those regulations are merely looking forward to the act of export, and they are concerned to

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provide what shall be done before meat can be exported. They are not enabling, their character is restrictive, and at most section 52a of the State Act and the regulations are concurrent or cumulative provisions upon using premises for slaughtering for export. If the Commonwealth wants to make its laws exclusive and exhaustive it can do so. The question is whether Commonwealth power has been exercised to the extent that there is no room for State law. It is, of course, conceded that as soon as there is a contradiction between State law and Commonwealth law the latter prevails. The test of " inconsistency " stated by Dixon J. in *Ex parte McLean* [1] is accepted: " The inconsistency " (that is, within the meaning of section 109 of the Commonwealth Constitution) " does not lie in the mere co-existence of two laws " which are susceptible of simultaneous obedience. It depends " upon the intention of the paramount legislature to express by " its enactment, completely, exhaustively, or exclusively, what " shall be the law governing the particular conduct or matter to " which its attention is directed." Upon the test of inconsistency adopted by the High Court the Act was not inconsistent with the regulations. The Commonwealth can legislate for the whole field, but, looking at these regulations as a whole, it did not do so.

Stated shortly, the submissions on the merits are that the regulations are of the character decided by Webb and Taylor JJ. in this case. They neither enable in the sense of permitting a person to slaughter for export, and, furthermore, they are not even restrictive in the sense that they take the form of commands which are not observed at the risk of penalty. The regulations are merely working up to the point of export, and if a person does not comply with them he will not be able to export. If the High Court is right that the regulations are exhaustive, then the Local Government Act, 1934–1952, of South Australia could not validly apply to such an establishment. There is nothing in the regulations to say that they are intended to operate exclusively so far as State laws are concerned. If the regulations do leave room for a State law on this subject-matter it can make no difference whether it be a general law or a particular law. Admittedly these things do become matters of degree eventually, but on the High Court's judgment a general State law which requires a licence before a person can carry on a slaughterhouse cannot be validly applied to slaughtering for export. [Reference was made to the Acts Interpretation Act, 1945, s. 3.]

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[1] (1930) 43 C.L.R. 472, 483.

The test of "inconsistency" adopted by the High Court is not contested, and two instances where the High Court have applied that test are *Clyde Engineering Co. Ltd.* v. *Cowburn*[2] and *Ex parte McLean.*[3] [Reference was also made to *Stock Motor Ploughs Ltd.* v. *Forsyth*,[4] *State of Victoria* v. *The Commonwealth*,[5] *Carter* v. *Egg and Egg Pulp Marketing Board* (*Vict.*)[6] and *Tasmanian Steamers Pty. Ltd.* v. *Lang.*[7]] Those cases illustrate how the High Court have applied the test, sometimes unanimously, sometimes with dissent. Here there is a State Act which is within the legislative competence; if it is to be invalid it must be so because the court is satisfied that there is inconsistency; the way in which the High Court was satisfied that there was inconsistency was by saying that there was no room for State law at all. That should not be accepted; there was here no inconsistency, but merely two restrictions, which can co-exist together.

The second branch of argument is that if the Board comes to the conclusion that there is inconsistency, then the question arises whether the regulations were authorized by the Customs Act. They were not authorized by that Act. If the regulations be construed as excluding by implication all State laws which in any way impinge, directly or indirectly, on the operation of slaughtering for export, then they proceed beyond the limit of any possible provision which could be said to relate to "the conditions of "preparation or manufacture for export of any articles used for "food or drink by man or used in the manufacture of articles "used for food or drink by man" (Customs Act, s. 270 (1) (*c*)).

Frank Gahan Q.C. and *J. G. Le Quesne* for the States of Tasmania and New South Wales (interveners). These States support the appellant on all points. Whether section 52a is in full force and operation is the narrow but important question. State legislation would be inoperative in respect of slaughter for export in either of two cases: (1) if it could be shown that there was a direct conflict between State legislation and some provision of the Commonwealth legislation, and (2) if it could be shown that the Commonwealth legislation occupied the subject-matter field to such an extent that there was no room for the State legislation. There is no direct conflict here. Whether the Commonwealth regulations do show an ousting intention so as to displace section 52a is to be considered against the Federal background consisting of six States and two Federal Territories. If State machinery existed, and the Commonwealth recognized it, then the two systems could work side by side fully, unless and until there was an actual conflict in a particular detail—when the Commonwealth would prevail. The construction of regulation 103 is consistent only with the view which has been advanced on behalf of the appellant. With regard to the Northern Territory Ordinance, there must thereunder be no slaughter for any purposes whatsoever unless a licence is held; those are absolutely general provisions enacted by the Commonwealth about which there would be no difficulty whatever if the appellant's view is right. These States support entirely the argument for the appellant.

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[2] (1926) 37 C.L.R. 466, 489.
[3] 43 C.L.R. 472.
[4] (1932) 48 C.L.R. 128.
[5] (1937) 58 C.L.R. 618.
[6] (1942) 66 C.L.R. 557.
[7] (1938) 60 C.L.R. 111, 125.

H. G. Alderman Q.C. (Australia) and *Ian Baillieu* for the respondent company. Section 52a is not aimed at, nor has it any application to, the use of premises for slaughtering or at the methods of slaughtering. It applies to persons who, like the respondent, have been approved by the local governing body as fit, and to the slaughtering in premises which have been erected and occupied in accordance with the building, town planning and health laws of the locality. The offence is committed only if, at the time of slaughtering, the person has a particular intention in his mind not only to export but to export it frozen. The respondent could have done everything which it did in perfect conformity with all State laws if it had intended to sell locally or inter-State, or if, after slaughtering, the goods were acquired by a purchaser for export. It could supply to an inter-State shipping company but not to an overseas shipping company. It would commit no offence if the meat were exported fresh (e.g., by air to New Zealand) or salted, canned or preserved, or if it were frozen pork.

The High Court decision is not far-reaching. It decided that the export power may go back as far as production for export, not that it always does. That is why that court said its decision is narrow. It applies only to meat which is in a special class.

The Commonwealth and the State are in the same field, viz., production for export. There is the same discrimen in section 52a as in the Commonwealth regulations, viz., the very intent to export. The section and the regulations cannot live side by side as this prosecution itself proves. *Clyde Engineering Co. Ltd. v. Cowburn* [8] establishes that there is inconsistency even if one

[8] 37 C.L.R. 466.

can obey both laws, which the respondent could do here only if it did not kill with the intention of exporting.

There is nothing in the Commonwealth regulations which overrides any State law except such as is based on the mere intention to export, which is the vice of the State law. The Commonwealth registers the premises only after they are erected, presumably in accordance with State law. The history of the section suggests that it was designed to circumvent the Commonwealth regulations.

All conditions for export are set out in these regulations. The appellant has not suggested any condition which is missing. The High Court has time after time pointed out the need for an Australian-wide policy as regards many matters internal and external and, in particular, exports which depend for their success overseas on a Commonwealth certificate as to standards.

Conditions in the several States may vary considerably but the export standard must be uniform. The Commonwealth export officers could not carry out their duties if they had to inquire from day to day what were the ever-changing State laws. The complicating and perhaps narrow interests of the States acting individually or in combination cannot prevent export or interfere with Commonwealth export policy or with the Commonwealth's power to carry out its Meat Export Agreement with the United Kingdom.

Reference should be made to the completeness of the regulations as regards grading standards which are exhaustive. Section 52a is not aimed at standards and, accordingly, the attempt to justify it on the ground that it raises or maintains State standards for export fails. That the Commonwealth laws cover the ground and are intended to override State laws is demonstrated by regulation 91, which states explicitly that anyone who complies with the regulations is entitled to an export permit.

It is inconceivable that there should be a conflict at the wharf between State and Commonwealth officers as to whether goods could be exported, whether on the basis of standard or otherwise. Whenever the Commonwealth regulations intend that State law shall continue to operate they say so expressly. See, for instance, regulation 92 (2). Regulation 103 is only another such instance. In fact, there appears to be no State law whereby the State inspects and approves before export, but, if there were, the Commonwealth Minister's approval and direction under regulation 103 would be his adoption of the State action as his own. Section 15a of the Meat Export Control Act is another example.

That the Commonwealth regulations are not (as the State law is) merely another clog upon export is also shown by the Meat Export Control Act, ss. 15 and 19, and regulation 7a under that Act, which imposes on anyone registered to slaughter and licensed to export a statutory duty to slaughter for other meat exporters. That Act and regulations, as well as the Customs Act and regulations, must be considered in ascertaining the field of Commonwealth legislation. The meaning of the cliche "covering "the field" is well set out by Evatt J. in *Stock Motor Ploughs Ltd.* v. *Forsyth.*[9] The field may be any one of four, viz., the intention to export, the prohibition on export, the conditions precedent to a right to export, or the control (including the sense of regulate and facilitate) of export. The High Court decided that the field was production for export, but the respondent need not go farther than the intention to export, and the Commonwealth field is certainly as wide as that.

The Northern Territory Ordinance, if at all relevant, tends to support the respondent's position. In the Northern Territory an exporter would have to do what the respondent has done here, i.e., comply with all local laws relative to slaughterhouses and then apply under the Commonwealth regulations to be registered for export.

Three judges of the High Court were in favour of the appellant. One held section 52a valid because it did not deal with export but with the purely local operation of slaughtering. Another judge so decided on the opposite reason that it tended to maintain the State's standard for export in which it had a paramount interest.

The test of inconsistency stated in *McLean's* case [10] is correct, but in that case it was obiter and too narrow. The width of the High Court decisions is best disclosed by *Clyde Engineering Co. Ltd.* v. *Cowburn* [11] and, in particular, *Colvin* v. *Bradley Brothers Pty. Ltd.*[12] The High Court's decision and dicta show that a general law not aimed at Commonwealth power will not be held to be inconsistent because of a possible or fanciful conflict.

The High Court's decision that section 52a is inconsistent with the Commonwealth regulations and therefore invalid by reason of section 109 of the Constitution is correct. The regulations are validly made in the exercise of the power conferred by section 270 (1) (*c*) and (*d*) of the Customs Act in that they are a law prescribing "the conditions of preparation or manufacture

[9] 48 C.L.R. 128, 147.

[10] 43 C.L.R. 472, 483.

[11] 37 C.L.R. 466, 478, 479, 483.

[12] (1943) 68 C.L.R. 151.

"for export of any articles used for food," and they set up "conditions as to purity, soundness and freedom from disease to "be conformed to by goods for export." As to the argument that there is power in the Customs Act only to prohibit, it is submitted that the power to prohibit includes the power to permit subject to conditions. The regulations were passed before the Amending Customs Act of 1951 and, although not expressly validated by that Act, it is clear from section 7 of the amending Act that they are contemplated as being within section 112 (2) (*c*) as then amended.

With the consent of the Board, Sir Garfield Barwick will deliver the argument based on section 74.

Sir Garfield Barwick Q.C. (Australia) and *John Brunyate* for the Commonwealth of Australia (intervener). The Commonwealth wishes to maintain the decision of the High Court. Before the High Court the Commonwealth limited its intervention to the question of its power to make its prohibitions and permissions with respect to slaughter for export the only prohibitions and permissions in that connexion. The Commonwealth left to the parties the question whether there was inconsistency between its provisions and section 52a of the State Act. The High Court accepted the Commonwealth's submission and decided that it has the constitutional power to determine exclusively the conditions of slaughtering for export. That decision cannot be reviewed by this Board. The question of whether or not the Commonwealth has exercised its power and created an inconsistency is ephemeral, having regard to the evident desire of the Commonwealth to control this field and to maintain the High Court's present decision to its full extent. The question whether the draftsman succeeded in exercising the power concerns the respondents much more than it does the Commonwealth. But, without discussion of them, the Commonwealth makes the following submissions thereon: (1) That the view that the field covered is wider than the mere use of premises for slaughter for export is exaggerated and is not a correct view. (2) On the fair construction of the regulations the use of premises for the slaughter otherwise than in accordance with Federal regulations is forbidden—that is implicit in the regulations. (3) Also on a fair reading of the regulations, particularly the licence which was granted, the Commonwealth intended to choose who should slaughter as well as to fix the conditions under which the slaughter should take place on the premises. If the last point commends itself to the Board—that there was a permission to use the premises—one does not need to fall back on any idea of covering the field at all, because you get direct contrariety—the Commonwealth says that you may and the State that you may not.

With regard to the inter se question, the tendency of Australian decisions is admittedly against the argument to be now presented, but those of the Board support it. The argument results in these propositions: (1) That a decision that a State law is invalid because of inconsistency with Federal law is a decision upon a question inter se within the meaning of section 74. That is the major proposition. (2) Alternatively to that, a decision that a State law is invalid because of inconsistency with Federal law is a decision necessarily involving a question inter se. In support of the second proposition the argument would be directed to these sub-propositions: (a) the decision that the State Act is invalid is a single decision—one decision; (b) that the integers in its ratio decidendi are not separable so as to form the subject-matter of separate "pleas" within the meaning of that word as used in the *Bank* case.[13] Consequently the appellant may not accept such of the integers in the ratio as may involve inter se questions and isolate the remainder of the ratio as an available matter of appeal to this Board. Stated directly, if any of the integers in the ratio decidendi involve a question inter se, the decision reached by the reasoning in totality itself involves a question inter se.

As to the first of the above propositions, a fundamental analysis of the Constitution shows that the scheme is, first, to give certain exclusive powers to the Commonwealth; secondly, to withdraw certain powers by means of prohibitions either from both the Commonwealth and the States, e.g., section 92, or from one or other of them, e.g., sections 115 and 116; thirdly, to give the Commonwealth power as to certain listed matters, but not exclusively, section 51; and, lastly, otherwise to confirm the Constitutions of the States. An inter se question is one which involves the existence of a mutual boundary of powers, a dividing line on either side of which there is power as to the particular matter in discussion. The delineation of the extent of an exclusive power does not involve an inter se question. No mutual boundary is involved. Power exists only on one side of the boundary fence with respect to the matter in question. This is decided in relation to Federal exclusive power, in substance in *James* v. *Cowan*,[14] and expressly in *Nelungaloo Pty. Ltd.* v.

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[13] [1950] A.C. 235; 65 T.L.R. 633; [1949] 2 All E.R. 755.

[14] [1932] A.C. 542, 560.

Commonwealth of Australia.[15] The same conclusion is involved in *Jones* v. *Commonwealth Court of Conciliation and Arbitration.*[16] The same must be true of the delimitation of a State exclusive power that is the residuum after withdrawal of powers from the State and the grant of concurrent powers to the Commonwealth. No mutual boundary, no inter se question, is involved in the definition and application of the prohibitions, the withdrawn powers. This was decided in *James* v. *Cowan.*[17] Therefore, the only area in which a mutual boundary can be found is in the concurrent field. But, though concurrent, section 109 from the outset makes the Federal power paramount. Whilst neither Commonwealth nor State have exercised a concurrent power, no question of a mutual boundary can arise. Each retains concurrent power over the whole subject-matter. Nor is there any such boundary if the State alone has exercised power in the matter. It is only on the exercise by the Commonwealth of a concurrent power that a mutual boundary can be found. Section 109 does not draw the mutual boundary. The boundary is to be found at the limit of the operation of a valid Federal law made under the concurrent power. Behind that line State power has had to retire by virtue of section 109. That this is the mutual boundary is necessarily involved in the decision of the Board in *Jones's* case.[18] See also *Nelungaloo Pty. Ltd.* v. *Commonwealth.*[19] In the concurrent field the effect of a Federal law in depriving a State law of its validity or the State of power to make an inconsistent law raises an inter se point. And, therefore, the question of drawing the exact boundary behind which the State power has had to retire is necessarily and par excellence a decision inter se. The question of whether or not a decision as to inconsistency between a Federal and a State law raises a question inter se has not been debated before the present case.

Constitutional power under this Constitution is never decided in the abstract. It is only decided inter parties and to the extent necessary to decide their rights. Thus, no opportunity is afforded to delimit the Commonwealth power in the abstract. It can only be delimited pro tem by a decision inter parties that a particular statute is within power. The decision is that the power extends thus far. Although the particular Act does not exhaust the Federal power, pro tem it marks out the limit of the Federal power at the point to which the State power has had to retire.

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[15] [1951] A.C. 34, 48.

[16] [1917] A.C. 528, 532.

[17] [1932] A.C. 542.

[18] [1917] A.C. 528.

[19] [1951] A.C. 34, 50–51.

The limit of the valid operation of the Federal Act is therefore the mutual boundary.

The court's expression of opinion, in the course of deciding a case, that the Federal power would not only support the Act under consideration, but some Act of a wider operation, is not itself a decision on the extent of Federal power. It is only part of the ratio of a decision that the particular Act is valid. To place an interpretation on the extent of a Federal power, that is to say, on the meaning of one of the paragraphs of section 51, merely as part of the ratio does not itself affect State power. That power is only affected by the valid operation of the Federal Act itself. A decision that a Federal Act passed under section 51 is valid has been held to be an inter se question. See particularly *Nelungaloo Pty. Ltd.* v. *Commonwealth*[19] and *Grace Bros. Pty. Ltd.* v. *Commonwealth of Australia.*[20] The reason assigned is that the valid Federal law has deprived the State of power: *Jones's* case.[21] To determine the validity of a Federal statute it must be construed, and for this purpose its maximum operation must be determined. It is not enough, as in a unitary system, to say that on its true construction it covers the instant case. The question is one of validity and regard must be had to its fullest operation. Thus necessarily involved in the question of the validity of a Federal statute passed under section 51 is the question of its construction. It may be summed up in this way: there is no boundary drawn by the Constitution itself between the powers in the concurrent field. The constitutional limit of the State power in the concurrent field is the extent of the Federal exercise of power. The inability of the State to pass or maintain a law which is inconsistent with an existing valid Federal law in the concurrent field is a constitutional inability. Limits inter se are therefore at the point of the utmost operation of the valid Federal law. Such limits are drawn by taking these steps: First, by identifying the relevant Federal law; that is to say, the law with which the inconsistency is said to exist. Secondly, to construe that law to find out how far it will operate. If it is subordinate legislation, it is then necessary to decide its statutory validity as so construed. This step is necessary because it is only a valid operation, whether the validity be derived from statutory or constitutional sources, which will mark the boundary. If the Federal law is invalid for any reason, constitutional or statutory, the State's power has not been invaded and, with respect to the particular subject-matter, is unimpaired. Therefore, there is no mutual boundary. In deciding the construction of the Federal law, whether it be an Act or subordinate legislation, it may be necessary to apply section 15 or section 46B of the Acts Interpretation Act in order to find the exact limit of valid operation. By these processes one decides how far the Federal law has in law gone; what is its utmost valid operation. That is the only relevant decision. There is not in any case a decision as to how far the Federal power may extend in the abstract. Failure to recognize that the ratio decidendi does not set the limit of power tends to the conclusion that with respect to the Federal law a decision as to inconsistency affects only the law and not the power. The language of *Jones's* case [22] is explicable on the view that the exercise of the Federal power pushed forward the frontier of Commonwealth power and marked the boundary of the recession of the State power. The Board's decision in *Nelungaloo* [23] supports that view and was founded on *Jones's* case [24] and denied the views asserted in *Ex parte Nelson* (*No.* 2).[25] The question in this case is, has the State power to maintain section 52a? The answer to that depends on how far the Federal law upon its right construction and having regard to its statutory basis extends. The question of the statutory existence of the Federal regulations, the question of their proper construction, including their intention to occupy the field, and the question of Federal power to support them, are all essential and indispensable steps in determining what is the extreme limit of the operation of the valid Federal law. That is to say, all are necessary and indispensable steps in fixing the mutual boundary. All are essential parts of a decision inter se. No part of the argument of the appellant is open to it before this Board.

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[19] [1951] A.C. 34, 50–51.

[20] [1951] A.C. 53, 61.

[21] [1917] A.C. 528.

With respect to the second proposition, and the sub-propositions, it is conceded, or at any rate not argued, that what is called the meaning of section 109 raises an inter se question. But it is said that its application does not. But the so-called meaning of section 109 is strictly not meaning at all. The test of whether or not there is an intention to cover the field is conceded to be the test of inconsistency under section 109. This is what is called the meaning of 109. But the test is only a yardstick to measure what is inconsistent. It is but part of the process of applying section 109. It is therefore submitted that quite plainly the application of section 109 involves a question inter se. The test cannot be isolated from the application and be accepted so as to leave only a question of its application as distinct from an application of section 109. If the meaning and application of section 109 involves a question inter se, the whole question of inconsistency, or no inconsistency, must do so. Ascertainment that there is a valid Federal law is an integral part of the decision on inconsistency. Here there is only one "plea" within the meaning of the decision in the *Bank* case.[26] The plea is that the law under which the appellant was prosecuted is invalid. The reasons by which that plea is supported are not themselves pleas. If any part of the reason for the one plea involves a decision inter se, the plea itself necessarily involves such a question and the jurisdiction of this Board is lost.

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[22] [1917] A.C. 528.
[23] [1951] A.C. 34.
[24] [1917] A.C. 528.
[25] (1929) 42 C.L.R. 258.

In connexion with the statutory validity of the Federal regulations *In re Fletcher*[27] was referred to.

H. G. Alderman Q.C. The argument of Sir Garfield Barwick on the inter se question is adopted by the respondent, but the respondent's proposition is not so wide. The *Nelungaloo* case[28] for the first time established the proposition that any question arising under section 51 of the Constitution involved an inter se question. That was so held, it would appear, by reason of the application of section 109. That was not a view which had been held or expressed previously. In the *Nelungaloo* case[28] there was no conflict between Commonwealth and State legislation at all. The respondent's argument is confined to saying that section 109 raises an inter se question. As to the possibility of separating "meaning" from "application," it is suggested that that is impossible, and for the reason that the meaning does not really decide any question of boundaries. [*Jones's* case[29] was referred to.]

D. I. Menzies Q.C. in reply. It is submitted that no question of powers inter se are involved at all. True it is there is a question as to the power of the State to maintain an effective and operative law, namely, section 52a, but in the way in which this case comes to this Board there is no question whatever as to Commonwealth power, and for present purposes there cannot be an inter se question unless the determination made by the Board determines something which defines both Commonwealth and State powers. There is no question of Commonwealth power involved in this case. With regard to section 74, it is submitted: (1) It is only concerned with constitutional powers—anything short of constitutional power is not touched by section 74. There is nothing inconsistent with that view in *Jones's* case.[30] (2) It is only concerned with the limits inter se of constitutional power of Commonwealth and States. Those words "inter se" are of great significance. One cannot have an inter se question which does not touch both Commonwealth and State powers. (3) Its effect is confined to preventing a determination by this Board of an inter se question. That appears from the section itself, and that was the decision in the *Bank* case.[31] (4) That one has exactly the same question that is contemplated as to powers of a State vis-à-vis another State as between State and Commonwealth. The test for the Commonwealth, it was conceded, would not fit that case; the appellant's does entirely.

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[26] [1950] A.C. 235.

[27] [1955] 3 W.L.R. 172.

[28] [1951] A.C. 34.

[29] [1917] A.C. 528.

Passing to section 109, to indicate just how far that section is from any inter se question; it is concerned with nothing more than the "validity" of the State law. It does not start to operate until there is a Federal law that is valid, and then it says that in so far as the operation of a State law would interfere with the effective operation of a Federal law, that State law is invalid. A long line of Australian cases says that the application of section 109 is not an inter se question. There is a precise decision of the High Court that an inconsistency question is not an inter se question. Whatever meaning one attributes to section 109, it affects Commonwealth power not one iota; the meaning of section 109 can only affect State power. The question of inconsistency is a separate question from the question of Commonwealth power and it can be applied before or after a decision is reached as to Commonwealth power. It is open to this Board to hear this appeal without in any way trenching upon the area which is reserved to the High Court by virtue of section 74 of the Constitution.

The above views are amply borne out by the authorities: the four relevant Privy Council cases are *Jones's* case,[32] the *Bank* case,[33] the *Nelungaloo*[34] and the *Grace Brothers*[35] cases. In every one of them what was involved was a constitutional question which related to Commonwealth power. There is no case where the question related to State power only, treated as an inter se question. The appellant here does not invite any determination by the Board of any inter se question which was part of the High Court's decision. [*Perpetual Executors Trustees and Agency Co.*

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[30] [1917] A.C. 528.
[31] [1950] A.C. 235.
[32] [1917] A.C. 528.
[33] [1950] A.C. 235.
[34] [1951] A.C. 34.
[35] [1951] A.C. 53.

(*W.A.*) *Ltd.* v. *Maslen*[36] was also referred to.] So the whole line of authority in the Privy Council establishes that so long as the Board does not have to determine an inter se question section 74 does not prevent any determination of the case. The line of authority in Australia on section 74 includes *Baxter* v. *Commissioners of Taxation* (*N.S.W.*),[37] *Pirrie* v. *McFarlane*,[38] *Ex parte Nelson* (*No.* 2),[39] *Ex parte McLean*,[40] *O'Keefe* v. *County Roads Board*,[41] *Joyce* v. *Australasian United Steam Navigation Co. Ltd.*,[42] the *Australian National Airways* case[43] and *Nelungaloo Pty. Ltd.* v. *The Commonwealth*.[44]

In summary, on the application of section 74 in the case of concurrent powers: (1) A decision of the High Court that a Commonwealth law is valid because it is within, or is invalid because it is outside, Parliament's concurrent powers is a decision upon an inter se question. (2) To determine what a Commonwealth law means, or whether subordinate legislation is within statutory power, is not to determine an inter se question. (3) The determination of the limits of State legislative power is not in itself an inter se question. It is so only in a case (if there be one) where the determination is also a determination of the limits of Commonwealth power. (4) The mere application, as distinct from the meaning of section 109, is not an inter se question. (5) In this case it is not necessary to decide whether the determination of the meaning of section 109 is the determination of an inter se question. (6) The Privy Council cannot entertain an appeal which cannot be allowed or dismissed without the determination of an inter se question. (7) The Privy Council can entertain and decide an appeal from a decision of the High Court upon an inter se question if, in disposing of the appeal, the Privy Council is not required to determine that question; that is *Maslen's* case.[45] (8) The Privy Council can determine this appeal, because whatever its decision, whether for or against the appellant, it will not determine any inter se question. There is no such question before the Board.

With regard to the merits of the appeal, the only question with which the Board is concerned is the validity of section 52a; if it is invalid, that is the end of the appeal. It was said for the respondent that the State has entered the Commonwealth field and therefore the State Act is invalid. Put in that way the proposition is wrong. There is no Commonwealth field as distinct from the State field; there is a field in which both can enter. The only limitation, so far as the State is concerned, is that if the Commonwealth occupies the field, if it takes all the room, then there is no room for any State law. The point here is: how far do the Commonwealth regulations leave room for State law? That can only be determined by going to the regulations. The real point made against the appellant is that the State law is bad in some way because it is dealing with slaughter for export and is aimed at defeating the Commonwealth law. Admittedly, if it would defeat the Commonwealth law it is bad, and it is further conceded that the Commonwealth could override provisions of the State law, but while the matter stands as it is, if the Commonwealth regulations do permit a general State law there is no room for the conclusion that they will not permit a particular State law. The regulations are not the whole law and, that being so, there is room for any State law which does not make a different provision, and that is to be tested by operation. If they do make a different provision, then of course *Colvin's* case [46] applies and the State law would fail on that particular ground. [*Tasmania Steamers Pty. Ltd.* v. *Lang* [47] was also referred to.] The benefit is to be given to a State law unless inconsistency is established.

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[36] [1952] A.C. 215, 225.
[37] (1907) 4 C.L.R. 1087, 1154.
[38] (1925) 36 C.L.R. 170, 223.
[39] (1929) 42 C.L.R. 258, 270.
[40] 43 C.L.R. 472, 482.
[41] (1931) 45 C.L.R. 27, 31.
[42] (1939) 62 C.L.R. 160, 164.
[43] (1946) 71 C.L.R. 115, 122.
[44] (1952) 85 C.L.R. 545, 562.
[45] [1952] A.C. 215.

The State Act has been in existence since 1937, the Commonwealth regulations have been amended after that, but there is nothing in the regulations as amended that gives any indication whatever of dissatisfaction with the existence of State law and any intention to override it. The regulation that is exercised by section 52a is not in any way inconsistent with the Commonwealth regulations. The appeal should be allowed.

Sir Garfield Barwick Q.C. in reply on the preliminary point. The argument for the Commonwealth on this point cuts across the views held in Australia for a long time; those views have stemmed from *Nelson's* case (*No.* 2).[48] The appellant and the Commonwealth are on common ground and agree that if one is going to define limits inter se one must define a reciprocal boundary, a mutual boundary of power. The Commonwealth, using *Jones's* case,[49] says that the dividing line between an exclusive power of the Commonwealth is not a mutual boundary. Mutuality will only occur where both of the authorities have some power and it is sought to divide it up between them in some way.

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[46] 68 C.L.R. 151.

[47] 60 C.L.R. 111, 125.

[48] 42 C.L.R. 258.

[49] [1917] A.C. 528.

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[Reference was made to *James* v. *Cowan*,[50] the *Nelungaloo* case[51] and *Carter's* case.[52]] Whenever the validity of a Commonwealth law has to be considered it must first be construed, because the extent of its relevant operation must be found to see whether it exceeds the power or not. But if a case is found where on any suggested construction the law is good, then the choice of one meaning rather than another is not inter se, and so also of statutory regulations. Section 109 of the Constitution has no application until one finds a valid Federal law. To say of a State Act that it is inconsistent under section 109 is necessarily to say that it has come into collision with a valid Federal law, and that is inevitably wrapped up in the assertion that it is invalid within section 109. The limit inter se is where the inconsistency occurs, because there is on the one hand State power denied, and on the other Federal power. But there still remains some power on both sides of the boundary with respect to the subject-matter; though, as to some particular aspect of the subject-matter, the Federal power has sought to occupy the field.

July 4. The judgment of their Lordships was delivered by LORD SOMERVELL OF HARROW, who stated the facts set out above and, dealing first with the petition for dismissal of the appeal, continued: The appellant in paragraph 13 of his case states that he accepts the decision of the High Court upon the meaning of section 109 whereas when he applied for leave this was one of the matters which he desired to argue subject to the question whether it raised an "inter se" issue under section 74.

The appellant by accepting the meaning placed upon section 109 by the High Court did not wish to be taken as admitting that the "meaning" of section 109 raised an "inter se" question within section 74. That could not arise in his argument once he had accepted the High Court decision on the meaning. It was also said in support of the petition that the appellant having previously suggested that the decision of the High Court on the issues competent in the appeal was far reaching now treated it as a narrow decision.

Their Lordships are of opinion that the petition should be dismissed with costs and will advise Her Majesty accordingly. The remaining issues are both difficult and important.

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[50] [1932] A.C. 542.
[51] [1951] A.C. 34.
[52] 66 C.L.R. 557.

The relevant facts have now been stated and their Lordships must deal at once with a preliminary objection to jurisdiction which was taken both by the respondent and the Commonwealth of Australia as intervener.

It was submitted that all the issues in the case, including the question of "inconsistency" and the question whether the regulations were intra vires the Customs Act, raised questions as to the limits inter se of the constitutional powers of the Commonwealth and the State of South Australia within the meaning of section 74 of the Constitution. In other words, there was no issue on which the Order in Council giving leave to appeal could operate.

It is not in dispute that it is competent for their Lordships to decide whether a question is an inter se question. If it is such a question they cannot entertain an appeal upon it without a certificate of the High Court.

The importance of the objection that has been raised in the present case has been emphasized by counsel for the Commonwealth. It can hardly be exaggerated. For the question that has now for the first time been raised before their Lordships is whether a plea of inconsistency between a Commonwealth law and a State law under section 109 of the Constitution involves an inter se question, and it is clear that a decision upon this question must have far reaching effects not only on the jurisdiction of Her Majesty in Council but also on that of the State Courts and the High Court, respectively, under the Judiciary Act.

The meaning of section 109 not being in issue, the test of inconsistency has been authoritatively stated in a number of cases in the High Court. It is sufficient for the present purpose to quote a few lines from the judgment of Dixon J. in *Ex parte McLean*[1] which have often been cited with approval: "The "inconsistency," said that learned judge, "does not lie in the "mere co-existence of two laws which are susceptible of simul-"taneous obedience. It depends upon the intention of the "paramount legislature to express by its enactment, completely, "exhaustively, or exclusively, what shall be the law governing "the particular conduct or matter to which its attention is "directed. When a Federal statute discloses such an intention, "it is inconsistent with it for the law of a State to govern the "same conduct or matter."

This being the accepted test of inconsistency, the question is whether it involves the determination of an inter se question to

[1] (1930) 43 C.L.R. 472, 483.

decide whether in a particular case that test is satisfied. Upon this question their Lordships find themselves so fully in accord with the view consistently taken by the High Court that they can deal with the matter shortly. It has already been said that in the present case an application was made for a certificate and was refused. In the course of the joint judgment of Dixon C.J., Williams, Webb and Fullagar JJ., it was said: "Once the con-"stitutional principle [scilicet, the meaning of section 109] is "accepted, we have never regarded the application of it in "deciding whether a given State law gave way to a given Federal "law as amounting in itself to a question as to the limits inter se. "In this court it has always been regarded as a question not "between powers but between laws made under powers." This statement is amply justified by a consideration of the numerous cases to which their Lordships were referred.

It was said, however, that in three or perhaps four cases which had come before the Board their Lordships had expressed a view which, if not in direct conflict with that consistently taken by the High Court, at least demanded a fresh approach to the question. From this proposition their Lordships strongly dissent. After the case of *Nelungaloo Pty. Ltd.* v. *Commonwealth of Australia* [2] (being one of the cases relied on by the respondent) had been heard by the Board and the appeal had been dismissed on the ground that an inter se question was raised and no certificate had been given, an application for a certificate was made to the High Court. In the course of his judgment Dixon J. said [3]: "Notwith-"standing the difficulties that were pointed out I do not think "that the judgments of the Privy Council in the three cases "demand any radical revision of the conception which has "prevailed in this court of what are questions as to the limits "inter se of the constitutional powers of the Commonwealth and "those of the States." With this statement their Lordships are in full agreement except that they think that the word "radical" suggests an unnecessary qualification: they do not think that any revision is demanded.

In *Jones* v. *Commonwealth Court of Conciliation and Arbitration*,[4] the first of the cases upon which the respondent relies, the essential question was as to the validity of an award by the President of a court constituted by the Commonwealth Parliament under placitum (XXXV) of section 51 of the Constitution. That depended on the power of the Commonwealth and upon the determination of the extent of that power depended the power of the State. Here was a direct issue as to the relative constitutional powers of Commonwealth and State which gave rise to an inter se question. As was observed by the High Court in *Australian National Airways Pty. Ltd. (No. 2)* v. *The Commonwealth*[5]: "The settled interpretation of the crucial words of section 74 " . . . is that they cover any decision upon the extent of a " paramount power of the Commonwealth." These words, which were cited with approval in the *Nelungaloo* case, are repeated here because they go to the heart of the matter. It is the extent of the power that must be in debate in order to raise an inter se question: the extent to which such a power has been exercised, when the validity of its exercise is not in question, is apt to raise an issue under section 109, but it does not raise an inter se question.

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[2] [1951] A.C. 34.

[3] (1952) 85 C.L.R. 545, 577.

[4] [1917] A.C. 528; 33 T.L.R. 358.

In the second of the three cases, *Commonwealth of Australia* v. *Bank of New South Wales*,[6] their Lordships can find nothing which in any way supports the view that the issue of inconsistency under section 109 by itself raises an inter se question. In that case an attempt was made to elucidate the very difficult problem which arises where other pleas than a plea to jurisdiction under section 74 are raised. In so far as it is relevant to the present appeal, it indicates that there is no justification for the Board refusing to entertain jurisdiction.

Reference has already been made to the third of the cases, the *Nelungaloo* case.[7] There, too, the constitutional validity of a regulation made under a Commonwealth Act was challenged and it was for that reason that an inter se question was held to arise. In delivering the opinion of the Board, Lord Normand said[8]: "But section 51 does not expressly divest the States of " any power, and it falls to the courts to determine where the " limits of the States' powers and the limits of the Common- " wealth powers are fixed. These questions of the limits of power " spring from the Constitution and they are questions as to the " limits inter se of the powers of the Commonwealth and the " States." As little in this as in the earlier cases do their Lordships see any justification for saying that the view consistently taken by the High Court of the scope of section 74 and its relation to section 109 has been questioned by the Board. If any phrase taken from its context raised any doubt, it should be set at rest by the statement made in *Grace Brothers Pty. Ltd.* v. *Commonwealth of Australia*[9] which immediately followed: "The question for decision is the same as that dealt " with by their Lordships in the *Nelungaloo* case.[10] It was there " decided that any question whether the Commonwealth had " exceeded the powers conferred on it by section 51 was an " inter se question."

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[5] (1946) 71 C.L.R. 115, 122.

[6] [1950] A.C. 235; 65 T.L.R. 633; [1949] 2 All E.R. 755.

[7] [1951] A.C. 34.

[8] Ibid. 48.

Their Lordships conclude by saying again that they endorse the view expressed by the High Court upon the application for a certificate in the present case, since they too regard a question of inconsistency under section 109 as "a question not between " powers but between laws made under powers." On the same principle the preliminary objection fails on the issue whether the regulations were intra vires the Customs Act, it being accepted that the regulations were intra vires the Commonwealth powers. The conflict suggested was not between powers but between "laws," namely, a section of an Act and regulations made or purporting to be made under it. Their Lordships therefore reject the preliminary plea to jurisdiction.

It is necessary, therefore, to consider the two issues raised by the appellant. First, is there an inconsistency? Second, are the regulations intra vires the Customs Act under which it was said they were made? The meaning of section 109, which has already been referred to in dealing with the preliminary plea, was stated in the following words in the judgment of Fullagar J. "The " test of inconsistency which is now generally applied was laid " down in *Clyde Engineering Co. Ltd.* v. *Cowburn.*[11] It has been " applied in a number of later cases: see especially *H. V. McKay* " *Pty. Ltd.* v. *Hunt*[12]; *Hume* v. *Palmer*[13]; *Ex parte McLean*[14]; " *Colvin* v. *Bradley Bros. Pty. Ltd.*[15]; and *Wenn* v. *Attorney-* " *General (Victoria).*[16] In *Clyde Engineering Co. Ltd.* v. *Cow-* " *burn*[17] Isaacs J. said: 'If, however, a competent legislature " ' expressly or impliedly evinces its intention to cover the whole " ' field, that is a conclusive test of inconsistency where another " ' legislature assumes to enter to any extent upon the same field.' " The test was analysed and fully stated by Dixon J. in *Ex parte* " *McLean*[18] in a passage which is often cited. His Honour said:

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[9] [1951] A.C. 53, 61.
[10] [1951] A.C. 34.
[11] (1926) 37 C.L.R. 466.
[12] (1926) 38 C.L.R. 308.
[13] (1926) 38 C.L.R. 441.
[14] 43 C.L.R. 472.
[15] (1943) 68 C.L.R. 151.
[16] (1948) 77 C.L.R. 84.
[17] 37 C.L.R. 466, 489.
[18] 43 C.L.R. 472, 483.

" 'When the Parliament of the Commonwealth and the Parlia-" 'ment of a State each legislate upon the same subject and " 'prescribe what the rule of conduct shall be, they make laws " 'which are inconsistent, notwithstanding that the rule of con-" 'duct is identical which each prescribes, and section 109 " 'applies. That this is so is settled, at least when the sanctions " 'they impose are diverse (*Hume* v. *Palmer*[19]). But the " 'reason is that, by prescribing the rule to be observed, the " 'Federal statute shows an intention to cover the subject matter " 'and provide what the law upon it shall be. If it appeared " 'that the Federal law was intended to be supplementary to or " 'cumulative upon State law, then no inconsistency would be " 'exhibited in imposing the same duties or in inflicting different " 'penalties. The inconsistency does not lie in the mere co-" 'existence of two laws which are susceptible of simultaneous " 'obedience. It depends upon the intention of the paramount " 'legislature to express by its enactment, completely, exhaus-" 'tively, or exclusively, what shall be the law governing the " 'particular conduct or matter to which its attention is directed. " 'When a Federal statute discloses such an intention, it is " 'inconsistent with it for the law of a State to govern the same " 'conduct or matter.' " In applying this principle it is important to bear in mind that the relevant field or subject is that covered by the law said to be invalid under the section. In the present case the law challenged is in one section in an Act of 128 sections. The question is whether the regulations express an intention to cover exhaustively the field or subject covered by that section. A decision that they do may or may not cover other provisions of the Act.

The Commerce (Meat Export) Regulations, with schedules, occupy 46 pages. It is unnecessary to consider the many detailed provisions which they contain. The export of meat is prohibited unless the establishment at which it is slaughtered, treated and stored has been registered. There are detailed provisions as to the lay out, necessary machinery and sanitation. The operations of every registered establishment are subject to the supervision of an inspector. There are detailed provisions as to how carcases are to be dealt with, rejection of diseased carcases, tins or containers for canning and so on. There are provisions as to marking. Finally, if the regulations have been complied with the inspector has to issue an export permit in a prescribed form. Regulation 4 of the Meat Export Control (Licences) Regulations prohibits the export of meat except by persons who hold licences, and the licensee has to comply with the Commerce (Meat Export) Regulations.

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[19] 38 C.L.R. 441.

Fullagar J. held that the regulations evince an intention to express completely and exhaustively the requirements of the law with respect to the use of premises for the slaughter of stock for export. It might be said to follow from this that if premises were to be used solely for slaughter for export everything to do with them, including their situation, would be outside all State law. Their Lordships cannot read the regulations as evincing so wide an intention. Their Lordships are unable to find in the regulations an intention to override generally all provisions of a State code dealing with slaughtering. They do not purport, in their Lordships' opinion, to oust, for example, State laws, if any, based on town planning considerations which might be of vital importance to the State but would normally be irrelevant to the regulation of the export trade. Assuming so complete an ouster would be within the powers of the Commonwealth it is not, in their Lordships' opinion, effected by the present regulations. If the State code dealing with slaughtering generally covered any specific matters dealt with in the regulations, the latter would no doubt oust and supersede the former quoad slaughter for export.

In the present case the respondent's slaughter-house had at all relevant times been licensed by the District Council of Noarlunga pursuant to Part XXVII of the Local Government Act, 1934–1952, and pursuant to the by-laws of the Council. On June 29, 1953, the respondent received a licence to export meat under section 17 of the Commonwealth Meat Export Control Act, 1935–1946. On September 9 the respondent's premises were registered under the regulations as an establishment in which, subject to certain conditions which need not be detailed, slaughtering for export could be conducted. It is not suggested that other requirements of the regulations were not complied with in respect of the slaughtered lambs, the basis of the complaint. The illegality is based on the fact that, having applied on January 31, 1953, for a licence under section 52a, the Minister of Agriculture of the State by letter of July 9 refused the application.

Section 52a is not part of a general slaughtering code. It is a special condition confined to the use of premises for slaughtering for export. Special conditions for slaughtering for export are precisely the field which, in their Lordships' opinion, the regulations evince an intention exhaustively to cover. In words used by Fullager J., " a State statute which has the effect of "prohibiting the use of premises registered under the Commonwealth regulations for the very purpose for which they have been registered under those regulations is plainly inconsistent with those regulations."

It was suggested that it was illogical to hold section 52a to be inconsistent with the regulations and at the same time to allow any operation for State law. What, it is said, would have been the position if a section passed in an Act with a different title and scope had provided that all those who wished to slaughter stock must obtain a licence from the Minister of Agriculture as provided in section 52a? It might be sufficient to say that that is not the case with which the Board have to deal. What happened in the present case would lead one to suppose that the respondent would have got a licence under such an Act since it obtained a general licence under the Local Government Act. Such a hypothetical law might or might not be challengeable on other grounds, but it could not be attacked, as is section 52a, as a condition restricting and applicable only to the export trade.

Reliance was placed by both sides on regulation 103. It reads as follows and was one of the original regulations:—
"103. Where by the law of any State any goods are required to be inspected and approved by a State authority before export, and the Minister is satisfied that such inspection and approval are as efficient as inspection and markings under these regulations, the Minister may direct that such inspection and approval shall be accepted, wholly or partly, in lieu of examination and marking under these regulations."

It was argued for the appellant that this meant that State legislation on the subject-matter of the regulations could exist alongside Commonwealth law and that the State authority, after inspection, could prohibit export although the Commonwealth authorities under the regulations had passed the meat as proper to be exported. Their Lordships agree with Fullagar J. that the paragraph means only that if satisfactory machinery happens to exist at any port, the Minister, in the interests of economy, may use it. If it is not so used then the Commonwealth will set up its own inspectorate to deal with meat for export. It does not imply that the State inspector could prohibit for export what the Commonwealth inspector had passed for export.

The appellant submitted to the Board in support of his case Ordinances of the Legislative Council for the Northern Territory providing for the establishment of abattoirs and the regulation and control of the slaughtering of stock. These were of general application. There was no provision to the effect that they should not apply to slaughtering for export. On the argument put forward by the respondent before the Board these Ordinances do not assist the appellant's case. A person desiring to set up an abattoir for slaughter for export would have to satisfy the provisions of the local law as to slaughtering generally, and get his local licence before he could apply for and get registration under the Commonwealth regulations.

The appellant in the second place submitted that the regulations so construed were ultra vires the Customs Act under which it was said they were made. The regulation making powers under the Customs Act are contained in section 112, as amended by No. 56 of 1951, and section 270.

" Section 112 (1): The Governor-General may, by regulation, " prohibit the exportation of goods from Australia.

" (2) The power conferred by the last preceding subsection " may be exercised . . . (*c*) by prohibiting the exportation of " goods unless prescribed conditions or restrictions are complied " with."

Section 270 provides as follows: " (1) The Governor-General " may make regulations not inconsistent with this Act prescribing " all matters which by this Act are required or permitted to be " prescribed or as may be necessary or convenient to be prescribed for giving effect to this Act or for the conduct of any " business relating to the Customs, and in particular for prescribing— . . . (*c*) the conditions of preparation or manufacture " for export of any articles used for food or drink by man or used " in the manufacture of articles used for food or drink by man; " (*d*) the conditions as to purity, soundness and freedom from " disease to be conformed to by goods for export."

Fullagar J. held that the regulations were within the power conferred by section 270 (*c*), and their Lordships agree. In other words, the power to prescribe conditions under that section covers the ouster of the condition imposed by section 52a.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The respondent failed on its preliminary point of jurisdiction but otherwise succeeded on the appeal. The appellant will pay two-thirds of the respondent's costs of the appeal.

Solicitors: *Blyth, Dutton, Wright & Bennett; Freshfields; Coward, Chance & Co.; Light & Fulton.*

C. C.

H. L. (E.)*

[HOUSE OF LORDS.]

1956
Mar. 14, 15, 19, 20;
April 19.

INLAND REVENUE COMMISSIONERS . APPELLANTS;

AND

BUTTERLEY CO. LTD. . . . . . RESPONDENTS.

Revenue—Profits tax—Separate trades—Nationalized industry—Company carrying on colliery undertaking and other separate trades—Colliery undertaking nationalized—Compensation—Interim income payments—"Profits arising from the trade or business"—Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *Sch. IV, para.* 7*—Coal Industry Nationalization Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 59), *ss.* 19, 22 (2), (3), (4)*—Finance Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *ss.* 31, 32, 43*—Coal Industry* (*No.* 2) *Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 79), *s.* 1 (2).

Mines and Minerals—Coal—Nationalization.

By section 19 (1) of the Coal Industry Nationalization Act, 1946, compensation for the transferred assets was "due on the "primary vesting date [January 1, 1947], subject to determination "of the amount. . . ." Section 19 (2) and section 22 provided for a right to "interim income" or to "revenue payments" for the period between "the primary vesting date and the date on "which any such compensation is fully satisfied." Payments were to be calculated for the years 1947 and 1948 under section 22 (3) of the Act and under section 1 (2) of the Coal Industry (No. 2) Act, 1949, payment under both these heads being termed "revenue "payments"; payments made subsequently to these years were to be calculated in accordance with section 22 (2) of the Act of 1946 and were called "interim payments."

A company carried on a number of businesses, including a colliery undertaking. On January 1, 1947, the assets of the colliery undertaking vested in the National Coal Board under the Act of 1946, and during the years 1947 to 1950 the company received "interim income" or "revenue payments" under section 19 (2) calculated in accordance with section 22 (2) and (3) of the Act of 1946 and section 1 (2) of the Act of 1949:—

Held, that these sums were not to be included in the computation of the company's profits for the purposes of assessment to profits tax. To bring a payment within the scope of profits tax as "profits arising in each accounting period from any trade or "business" it was not enough that it should be income derived from the property of the company without regard to the question whether it arose from a trade or business carried on by the company during the relevant period. The payments, though income, were not "income received from investments or other property" within the meaning of Sch. IV, para. 7, to the Finance Act, 1937. Neither was the capital asset (viz., the right to receive compensation) an asset so related to any trade or business carried on by the company that it fell within paragraph 7, nor (if it were) were the payments in question "income" of that asset.

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD RADCLIFFE and LORD SOMERVELL OF HARROW.

Decision of the Court of Appeal [1955] Ch. 453; [1955] 1 All E.R. 891 affirmed.

Appeal from the Court of Appeal (Evershed M.R., Jenkins and Morris L.JJ.).

This was an appeal from an order of the Court of Appeal dated March 10, 1955, allowing an appeal by the respondent company, Butterley Co. Ltd., from an order of the Chancery Division of the High Court of Justice (Roxburgh J.) dated July 27, 1954, whereby an appeal by the appellants, the Commissioners of Inland Revenue, on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was allowed and their determination was reversed. The matter arose on assessments to profits tax made on the respondent company in respect of profits for the accounting periods January 1, 1947, to December 31, 1950.

The facts, stated by Viscount Simonds, were as follows: The company was incorporated in the United Kingdom in the year 1888 and thereafter carried on a number of trades or businesses, amongst them the trade or business of colliery owners. By virtue of section 5 (1) of the Coal Industry Nationalization Act, 1946, the colliery assets of the company became vested in the National Coal Board on January 1, 1947, and thereupon, as was found in the case, its colliery trade ceased entirely. But it continued to carry on its other trades or businesses.

The Coal Industry Nationalization Act, 1946, which provided for the compulsory transfer of colliery assets to the National Coal Board, provided also for compensation being paid to the former owners. These provisions were of a complicated character, and as regarded the compensation of a capital nature, it was clear from the outset that a substantial time must elapse before the amount payable could be ascertained, and the compensation was entirely or largely to consist of government stock which was subject to severe restrictions in regard to disposal. But because there was seen to be this inevitable delay in assessing and paying compensation, the 1946 Act provided, by section 19 (2), that until such compensation was fully satisfied there should be a right to interim income which was to be satisfied as provided by section 22.

The relevant provisions of that section and of later sections of the 1946 Act, together with the supplementary provisions of the Coal Industry (No. 2) Act, 1949, and a statement of the sums received by the company under those provisions respectively, were set out in paragraphs 7 to 9 of the case stated by the Special Commissioners as follows:

"7. . . . (ii) Section 22 (2) is as follows: 'Subject to the provisions of subsections (3) and (4) of this section as to the revenue payments therein mentioned,—(*a*) the said right conferred by subsection (2) of section 19 of this Act shall be satisfied, so far as regards interim income for the period between the primary vesting date and the time when any amount of compensation in respect of a transfer of transferred interests or of an overhead expenses increase is satisfied, by making, in addition to the issue of the stock then issued in satisfaction of that amount of compensation or to the making of the money payment then made in satisfaction of that amount of compensation, as the case may be, a money payment of an amount equal to interest for that period on that amount of compensation at such rate or rates as may be prescribed as respects that period or different parts thereof by order of the Treasury . . .' Under the said section 22 (2) (*a*) the company received on January 14, 1949, £415 13s. 6d., net £228 12s. 5d.; on February 15, 1950, £64 3s. 5d., net £35 5s. 11d.; on March 17, 1950, £353 7s. 2d., net £194 6s. 11d.; on July 5, 1950, £27,123 5s. 8d., net £14,917 16s. 1d.; and on January 2, 1951, £1,882 18s. 0d., net £1,035 11s. 11d. These payments were all in respect of a broken period from the end of the year down to the date when compensation under sections 10 to 17 of the Coal Act, 1946, was paid, and represented 'amounts equal to interest' at rates prescribed by the Treasury varying between 2½ and 4½ per cent. per annum.

"8. (i) The relevant provisions relating to the payments arising under section 22 (3) are as follows: 'The following provisions of this subsection shall have effect as to the making to colliery concerns, . . . of payments in respect of each of the two years beginning with the primary vesting date and the first anniversary thereof respectively, that is to say,—(*a*) a colliery concern . . . shall be entitled in respect of each of the said two years to a payment of an amount equal to one half of the comparable ascertained revenue of the concern . . . attributable to activities thereof for which the transferred interests thereof were used or owned.' The payments under

" this subsection were based on the amount of profit earned in " the period before the colliery assets vested in the Coal Board. " The said payments were for the first two years after the vesting " of the assets in the Coal Board and under section 22 (4) were " ' deemed . . . to be in substitution for the provisions of sub- " ' section (2) of this section, so far as regards additions thereunder " ' for the said two years or any part thereof to compensation " ' for a transfer of transferred interests being compensation " ' attributable to transferred interests of that concern . . . except " ' as to any excess of the aggregate amount of such additions " ' over the aggregate amount of the revenue payments of that " ' concern . . .' (ii) Under the said section 23 (3) the com- " pany received on January 7, 1948, a sum of £66,189, net " £36,403 19s. 0d.; on April 26, 1948, a sum of £66,189, net " £36,403 19s. 0d.; on August 17, 1948, a sum of £66,189, " net £36,403 19s. 0d.; on February 22, 1949, a sum of " £84,249 8s. 7d., net £46,337 3s. 9d. . . . The said money " payments are described as ' revenue payments ' by section 22 " (3) (*b*).

" 9. (i) Finally the company received on March 17, 1950, a " sum of £76,430 6s. 10d., net £42,036 13s. 9d., under the pro- " visions of section 1 (2) of the Coal [Industry (No. 2)] Act, 1949. " . . . (iii) The payment received by the company . . . arose to it " by virtue of the provisions of section 1 (2) of the Coal [Industry " (No. 2)] Act, 1949, which so far as relevant is as follows: ' A " ' colliery concern . . . shall, in respect of the year 1949 and in " ' respect of any subsequent year before that in which compen- " ' sation under the principal Act in respect of the transfer of the " ' transferred interests of the concern . . . is satisfied in full, be " ' entitled to a payment of an amount equal to the amount by " ' which one third of the comparable ascertained revenue of the " ' concern . . . attributable to activities thereof for which the " ' transferred interests thereof were used or owned exceeds an " ' amount equal to interest for the year in question on the aggre- " ' gate amount of that compensation satisfied before the end of " ' that year.' (iv) Under section 1 (3) the said payment ' shall " ' be treated for the purposes ' of section 22 (2) (*a*) of the Coal " Act, 1946, ' as being made towards satisfaction of the aggregate " ' of the proportions attributable to that year of amounts which " ' that paragraph requires to be paid as additions to stock issued " ' or money payments made after the expiration of that year in " ' satisfaction of compensation in respect of transfers of trans- " ' ferred interests of the concern . . .' "

These were the sums which were, as the appellants claimed, rightly and, as the respondents claimed, wrongly included in the company's assessments to profits tax for the chargeable accounting periods from January 1, 1947, to December 31, 1950.

The respondents, having been assessed to profits tax in the manner mentioned above, appealed against the assessments to the Special Commissioners.

It was contended before them by the appellants: "(1) that "the payments . . . were income of the company proper to be "included in the computation of the profits of its trade or "business for the purpose of the profits tax; (2) that under the "provisions of section 19 (1) and (2), Finance Act, 1937, the "said payments were part of the profits of the trade or business "carried on by the company in the said chargeable accounting "periods . . . ; (3) in the alternative, that the said payments, "arising from the right to 'interim income,' 'revenue payments' "and further 'income payments' provided by the Coal [Industry "Nationalization] Act, 1946, and the Coal [Industry (No. 2)] "Act, 1949, were, on the true construction of paragraph 7 (1), "Schedule IV, Finance Act, 1937, as amended by section 32 (1), "Finance Act, 1947, 'income received from investments or other "'property.'"

For the respondents, the first contention, which was afterwards abandoned, was that the payments in question were not income, but, further, they contended, and thereafter maintained, that the payments were not part of the profits of the trades or businesses carried on by them during the relevant chargeable accounting periods but arose from their colliery concern, which trade ceased entirely on January 1, 1947, and, further, that they were not "income received from investments or other property" within the meaning of the amended paragraph 7.

The commissioners decided in favour of the respondents, holding that the payments constituted income of the respondents but that (a) the respondents' composite trade or business consisted at the material time (scilicet, before January 1, 1947) of a number of separate and severable trades of which their colliery concern was one, and that that trade ceased entirely on January 1, 1947, and (b) that, as a consequence of that finding of fact, the payments in question were not receipts of any trade carried on by the respondents during the relevant chargeable accounting periods, and (c) that on the proper construction of the relevant statutes the payments were not "income received from investments or other property."

The appellants having expressed dissatisfaction with this determination, the commissioners stated a case for the opinion of the court, which was heard by Roxburgh J. He disposed of the matters in favour of the appellants upon the short ground that the payments were income from property, namely, a chose in action consisting of compensation due but not yet paid. The present respondents thereupon appealed to the Court of Appeal, which unanimously reversed the judgment of Roxburgh J.

A. G. N. Cross Q.C., *Sir Reginald Hills* and *E. B. Stamp* for the appellants. These payments would admittedly not have come within paragraph 7 of Schedule IV of the Finance Act, 1937, as originally framed. Paragraph 8 is of the greatest importance because its words take up those of section 20 of the Act. Apart from paragraph 7, if paragraph 8 stood alone, one would bring into charge to profits tax, not only the profits of the trading operations of the company in the strict sense of the word, but also all its business income and the income of its investments from other property. Paragraph 8 is limited by the words "subject to the provisions of the last foregoing paragraph" but, apart from any express limitation, one would bring in under it all the business income of the company, not only what is derived strictly from its trading operations, but also any other income. All the business income covers income which is a business asset or is derived from a business asset. When one is dealing with a company there is not really any distinction between its income and the income of its business. That is the fundamental point of this case. The income of the company's investments, which may be used for all or any of its businesses, comes into computation for the purpose of profits tax, being part of the profits of its business. Under the Finance Act, 1947, all the company's trades are to be treated as one trade. It is admitted that nothing can be chargeable to profits tax which is not on the true construction of the Act profits of the trade or business, but the investments are a backing for all the company's businesses and the income of those investments comes in, together with the trade profits, in the narrow sense of the expression, of the actual operations of buying and selling, making one income. For the purposes of profits tax a company cannot segregate an asset which it owns, holding it as disconnected from the trade or business carried on and putting the income from it into a suspense account, so as to withdraw it from the tax. Alternatively, if it be held that a company can decide not to use the income of an investment in its business at all but to accumulate it and subsequently repay it to the shareholders or save it up for starting another business later, on the facts of this case it has not done so. In considering whether or not a company has done so, the only test can be what in fact it has done with the income, because the company can change its mind at the last moment.

A company having nothing but a colliery, so that after nationalization its only activity was to remain in existence until it got its compensation, would fall under section 19 (4) of the Finance Act, 1937. It would be holding property (viz., the right to compensation). The word "functions" in the subsection must mean what the company is actually doing, not what it is able to do, because under its memorandum it might have power to do a great many different things. Section 19 (4) is purely notional and the company would be deemed to be carrying on a business. Alternatively, the activities of agreeing the compensation and getting it in would constitute a business.

If the company cannot withdraw from the operation of profits tax any investment which it holds, every item of income which comes to it must be brought in for the tax except, under paragraph 7 of Schedule IV, franked investment income (viz., income received from another company which has itself borne profits tax on its income). A company might have investments so large in comparison with its trade that, after its decision to segregate them, its activities would be mainly the holding of investments as opposed to the carrying on of a trade. Then under section 19 (4) the income of the investments would come into the computation for profits tax. It would be odd if the company could escape profits tax by that device. Whatever investments a company holds, it holds for the purposes of its business. In the case of an individual, when one is asking what are the profits of his trade or business for the purposes of profits tax (apart from exempting provisions) one looks not only at the trading profits he has made by buying or selling goods but also at the income of the investments which he holds for the purposes of his business. In the case of a company such as this it is hard to see any distinction which a business man would draw between income paid into its general account and arising from investments, which it held and which were perhaps pledged to secure its overdraft, and the interim income of the compensation: see *Inland Revenue Commissioners* v. *Tootal Broadhurst Lee Co. Ltd.*[1]; *Tootal Broadhurst*

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[1] [1947] 2 All E.R. 409, 411–412; 29 T.C. 352. 363–364.

Lee Co. Ltd. v. *Inland Revenue Commissioners*,[2] which throws light on the nature of a business investment. If a company sold one of its concerns, the interim income of the purchase price would properly fall to be treated as part of the profits of the continuing business; assuming that the company could avoid that result by a segregation of its income one would have to find something expressly done to effect that segregation. It can make no difference that the acquisition here is compulsory. The distinction between the use of the words "profits arising . . . from "any trade or business" in section 19 (1) of the Finance Act, 1937, and "the actual income of the body corporate from all "sources" in section 31 (2) of the Finance Act, 1947, is not significant, especially as not all the income of a body corporate comes in for profits tax, since the franked investment income is excepted. The fact that it would be difficult to tell when a company had segregated its investment income strengthens the argument that it could not do such a thing, so as to withdraw that income from a computation of the profits of its trade or business.

If the only concern of this company had been the colliery business, it might have been argued that after nationalization no business of any sort, actual or notional, was being carried on, but here "the trade or business" within paragraph 8 of Schedule IV to the Finance Act, 1937, is the trade or business of the continuing trades which are treated as one. If it is conceded that the income of War Loan which the company employs in its business comes in, that shows that the words "arising from the "trade or business" cannot be given a narrow meaning, because that income does not in any intelligible sense arise from the trade or business but yet is a backing to it. If an Act were passed that the Government should take over all War Loan, and some other stock with another name were substituted for it, the substituted stock would be exactly in pari materia with the War Loan. What has happened here is that, in the place of the defunct colliery business, a valuable chose in action (a right to capital compensation and a right to income compensation) has come to belong to the company. In the absence of any positive decision to deal with it otherwise, the income is income for profits tax purposes. It is vital for the respondents to say that the compensation only becomes a capital asset of the continuing trade when it is satisfied by the issue of the stock, because if, while it is still only a chose in action, it is a capital asset of the continuing trade, the income flowing from it is still in the same position. The interim income payments form part of the credit receipts which are to be taken into account in computing the profits arising from the trades or businesses carried on by the company in the relevant period, which under section 43 (1) of the Finance Act, 1947, are to be treated as one trade or business for the purpose of profits tax. The colliery business had ceased entirely and these payments were income arising from all the other trades. The effect of section 20 (1) of the Finance Act, 1937, is to bring into computation, for profits tax purposes, profits arising from a trade or business which, for income tax purposes, would not be charged under Schedule D at all but would be charged, for example, under Schedule B, so that, apart from Schedule IV to the Act of 1937, the income of business investments would be chargeable. This provision would cover business investments which would be profits, only computed under another Case. Section 20 (1) and paragraph 7 of Schedule IV to the Act of 1937 cannot be read in isolation. The opening words of paragraph 8 imply that, but for paragraph 7, all income of investments would come in by reason of paragraph 8 and section 20 (1) together, which really have the same language. By the Act of 1947 the scope of paragraph 7 was much diminished, so that in effect only franked investment income was excluded, but the set-up of the sections and paragraphs remained the same. By virtue of section 20 (1) one must look at everything which is a profit arising from the particular trades or businesses being carried on and disregard what Schedule it would be assessed under. Paragraphs 7 and 8 say that income received from investments or other property which would otherwise fall to be included in the profits arising shall not be included except in certain cases. The legislature must have thought rightly that income received from investments could, at least in some circumstances, be profits chargeable under one or other of the Schedules.

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[2] [1949] 1 All E.R. 261, 264, 268; 29 T.C. 352, 371–372, 376.

Fry v. *Salisbury House Estate Ltd.*[3] emphasizes that for income tax purposes one may have the trading profits of a company taxed under a number of different Schedules.

The charging words are in section 19 of the Act of 1937 and Schedule IV and section 20 help one to see what is included in it.

Wernher v. *Inland Revenue Commissioners*,[4] *Inland Revenue Commissioners* v. *Gas Lighting Improvement Co. Ltd.*[5] and *Gas*

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[3] [1930] A.C. 432, 454, 456; 46 T.L.R. 336.

[4] [1942] 1 K.B. 399, 404–408.

[5] [1922] 2 K.B. 381, 383–384, 387–390, 392–393; 38 T.L.R. 613.

Lighting Improvement Co. Ltd. v. *Inland Revenue Commissioners* [6] are also relied on.

If a board of directors decided to sell one of a company's businesses, because it had not enough money in the other businesses and it was not desired to raise more money from the public, and the business was sold for a capital sum payable in the future with interim income payments and that interim income was used in the continuing business, as was the purchase price when it was paid, the interim income would be in exactly the same position as income from War Loan held by the company on income from reserves. It makes no difference here that the purchase was compulsory. The artificiality comes in by including in the profits arising from the trade or business something other than the mere profits arising from trading activities.

In section 19 (4) of the Act of 1937 the words "or mainly" were put in ex abundanti cautela to meet the case of a company which took some of its assets out of the category of reserves of the trading business, so as to become an investment company with regard to that part of its investments and carry on a separate business.

It is not conceded that after the colliery trade came to an end on the day of vesting there was no business. In the offices of such companies as this there was a great deal of activity for several years thereafter and much money was spent in employing staff and negotiating. This constituted a trade carried on by the company within section 19 of the Act of 1937. On this point see *Inland Revenue Commissioners* v. *Parkhouse Collieries Ltd.*[7]

Section 31 (1) of the Act of 1947, with section 32 (1) amending paragraph 7 of Schedule IV to the Act of 1937, shows that the legislature was not trying to distinguish between profits of a body corporate and profits of a business carried on by a body corporate.

It was admitted in the Court of Appeal by the appellants that if this was income from property which had nothing to do with the trade or business, whatever that might be, it was not caught, but it was contended that this was an almost impossible conception as a matter of fact.

In summary, it is clear that under either paragraph 7 or paragraph 8 of Schedule IV the income of reserves is taxed and there is no real difference between that income and the income here. This income is income from property in the same way as War Loan interest.

[6] [1923] A.C. 723, 729–730, 735–736; 39 T.L.R. 504.

[7] (1955) 34 A.T.C. 166.

Sir Reginald Hills following. The common-sense point of view is that the company had a business, was earning profits and distributing them to its shareholders and had a valuable business asset in respect of which it received income. This income was part of the profits arising from the trade or business.

The words " trade or business " are a very wide expression. The question of the passive receipt of income has a very long history. One cannot consider the conception of a profit arising from a trade or business without a close eye on the background of this legislation. Section 20 (1) of the Act of 1937 says that this tax is to be " computed on income tax principles as adapted " in accordance with the provisions of Schedule IV to this Act." One must modify those principles because they do not tax anyone on the entirety of his incomings but divide the taxable subject-matter into four different Schedules, and in general one must exclude from the items making up the profits anything taxed under another Schedule. In general, income received by a company and taxed at the source could not be brought in under a Case I of Schedule D assessment because it was taxed in other ways.

But under paragraph 4 of Schedule IV to the Act of 1937 one gets a completely different account from anything that would ever be made up under Case I of Schedule D. It indicates that under that Act there is no system of deduction of tax at source for excess profits tax purposes and therefore one gets a totally different computation.

Paragraph 7 of Schedule IV to the Act of 1937 in its original form amounted to a very material variation of income tax law, because the income in question would not come in if the company were being taxed under Case I of Schedule D. Assessments under Case I of Schedule D bore no relation to an ordinary business account. From the Case I profit and loss account and balance sheet a lot was left out, and the provisions about what might be deducted for capital expenditure and the like came under income tax principles. Computation does not merely mean arithmetic, but covers what comes in to constitute profits.

If the transfer of this colliery had been a voluntary act, the sums in question would have been receipts of the entirety of the company's business. It does not make any difference that the transfer is involuntary. A receipt does not cease to be a business or trade receipt because it is out of the ordinary course of trade: see

Sutherland v. *Inland Revenue Commissioners*[8]; *Newcastle Breweries Ltd.* v. *Inland Revenue Commissioners*[9] and *Inland Revenue Commissioners* v. *Korean Syndicate Ltd.*[10] It is wrong to think that a company ceases to have an income because it gets rid of an asset which produced a business income at one time and receives an income in its place; it is, in the ordinary sense, a receipt of the business. It is just as if the company held War Loan which represented either capital subscribed or accumulated income, which it had invested.

The phrase "actual income of the body corporate from all "sources" in section 31 (2) of the Act of 1947 is a technical income tax phrase straight out of the income tax code, quite appropriate to that code and quite inappropriate to the profits tax code, and it is not helpful to contrast it with the profits tax expression in sections 19 and 20 of the Act of 1937, "profits "arising . . . from any trade or business."

This is a simple case where a company has somewhat varied its activities, has stopped one and has taken some property in lieu of it which bears an income; there is no reason why this income should be kept out of computation.

Charles Russell Q.C., *John Senter Q.C.*, *Desmond Miller* and *C. P. F. Jenkin* for the respondent company. This income is only chargeable to profits tax if it is profits of a trade or business carried on by the company during the relevant chargeable accounting period.

The appellants argued (1) that the income from all sources of a company which carries on a trade is necessarily part of the profits arising from the trade for profits tax purposes; (2) that, if that general proposition be wrong, the accounts of this company establish the fact that these payments were part of the profits arising from its post-1946 trades; (3) that, if that be wrong, the company after 1946 was carrying on the additional trade of negotiating and claiming the amounts of compensation and interim income and revenue payments and that these were profits arising from the carrying on of that trade.

The Crown conceded in the Court of Appeal that the claim to tax could not be established merely by showing that the interim income payments were income from property. It is a fundamental error that paragraph 7 of Schedule IV to the Act of

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[8] 1918 S.C. 788, 792–793; 12 T.C. 63, 69–70.

[9] (1927) 96 L.J.K.B. 735; 43 T.L.R. 476.

[10] [1920] 1 K.B. 598, 603; 36 T.L.R. 179; (C.A.) [1921] 3 K.B. 258, 270, 272–273, 275–276, 276; 37 T.L.R. 735.

1937 somehow extends the scope of section 19, the charging section.

As to the Crown's first proposition, profits tax is not expressed to be a tax on the income from all sources of a trading company. If that had been meant the legislature could have used the language employed in relation to the old corporation profits tax in sections 52 and 53 of the Finance Act, 1920. Thus a system of taxation applicable to the profits of a trading company provided language readily available to the legislature if in the case of profits tax it had been desired to say that all the income of a trading company was subject to this tax. But the Act of 1937 excluded income which would otherwise have been regarded as profits arising from a trade or business. The excess profits legislation of 1916 had the same effect: see *Gas Lighting Improvement Co. Ltd.* v. *Inland Revenue Commissioners.*[11] The Act of 1920 had quite a different approach because it did not start with the profits arising from a trade or business but with the profits of a company carrying on a trade or business, and in the express provisions as to what were those profits were to be found exactly what the Crown is arguing in the present case. In the Act of 1937 the legislature could, had that been its intention, have used an "all "sources" phrase and appended the exceptions to it. A company which carries on a trade may have assets which do not form part of its trading or business assets and the income of which therefore would not form part of the profits of the trade or business carried on. Thus "income received from investments "or other property" in paragraph 7 of Schedule IV to the Act of 1937 does not mean income from all investments and all property and cannot be related to income from investments or other property not connected with the trade or business carried on by the company; in such a case there would be no need for exclusion. The whole decision of the *Gas Lighting Improvement* case[12] was that there can be investments the income of which is not included in the profits arising from a trade or business.

Reliance is placed on *Liverpool and London and Globe Insurance Co.* v. *Bennett.*[13] If the answer to the problem in that case had been that all income from all sources (subject to specific exceptions) of the company which was carrying on the trade was out of the profits and gains of the trade, it would have been a very simple answer to give. What was said was that, having regard to the type of business carried on by that company and the purposes for which the investments were made, it was proper to treat those investments as part of the profits of the trade. It did not occur to the House that there was available a simple answer without a complete analysis of the whys and wherefores of the investments, namely, the answer propounded by the Crown in the present case—that any income coming to a company which happens to carry on a trade or business must necessarily be part of the profits of that trade or business. It is true that the phrase with which that case was concerned was "tax in respect of any "trade" in Case I of Schedule D, but it is substantially the same phrase in the excess profits tax legislation. It would be possible for a company to have a reserve entirely reflected by an earmarked asset, and in such a case it might be said that, since it was expressly dedicated, not for the company's business but for the purpose of equalizing dividends, any income from it was not part of the income of the company's business. Capital may be reduced by returning to shareholders capital which is in excess of the wants of the company. But if a company really had a general reserve fund for depreciation and replacement and invested, it might be held on inquiry that these were dedicated business assets and therefore the fruit of them was part of the profits of the trade or business of the company. Even assuming that in the present case one can equate the capital compensation rights with reserves for the businesses carried on after 1946, it does not follow that the revenue payments and interim income flow from that capital right and are income from that capital compensation right in the same way as income from reserve investments.

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[11] [1923] A.C. 723, 730, 736.

[12] [1922] 2 K.B. 383, 388, 389–390; [1923] A.C. 723, 730, 735–736.

[13] [1913] A.C. 610, 615–618, 618–620, 620–621, 622, 623; 29 T.L.R. 757.

The authorities already cited recognize that it is not in all cases that when a company carries on a trade or business all its income from all sources is within the phrase "profits arising from "a trade or business," unless expressly excepted elsewhere in the statute. That is also recognized in *Birmingham Small Arms Co. Ltd.* v. *Inland Revenue Commissioners*.[14] Investments are classified into assets which are related to the particular trade or business as distinguished from those which are assets of the company but are not related to any trade or business. If the assets and the income in question here were ever related to any trade or business at all, they were related to a trade or business which was a separate trade or business and which had ceased.

Paragraph 7 of Schedule IV to the Act of 1937 started its life as an exclusion provision, and its amended form under the Act of 1947 did not turn it into an inclusive section. Income from investments is not necessarily included in every case and it is certainly not included in the present case.

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[14] [1951] 2 All E.R. 296, 302–303.

If one had a company carrying on its trade and building up its reserves out of accumulated profits and putting them into general reserve or reserve for contingencies it would be incumbent on the company to show that something had happened to take their income out of the scope of profits tax. But the present is a different case.

It is not conceded that necessarily all investment income or income of other property is capable of coming under the charge to profits tax. Even if all types are capable, in any given case, of coming under the charge to profits tax, yet one must in each case look to see whether they do. On the Crown's view it would not have been necessary to discuss the matter at all in the *Liverpool and London and Globe* case.[15]

A company specifies its trade investments and its non-trade investments on the balance sheet. Normally it would have a trading and a profit and loss account. Into the trading account it might bring the dividends of trade investments. Into the profit and loss account would come dividends and income from other non-trade investments.

Section 19 (7) of the Act of 1937 contained a provision under which it was possible to remit the profits tax on the profits arising not merely from a particular trade but from a particular industrial undertaking set up in the depressed areas. It was envisaged, therefore, that one might consider in isolation the profits of a particular industrial undertaking.

If one looks at the whole matter before 1947 it appears that in the case of a company or an individual the tax was not on the profits of the company or individual who carried on the trade but on the profits of a trade carried on by the company or individual. One might find a company carrying on a business or a trade in partnership with an individual. Plainly neither all the income of the individual nor all the income of the company would be profits arising from that trade; one would have to inquire what was actually committed in the particular trade before one could see what income from investments or other property could be included in the profits arising from that trade.

In the Act of 1947 there was no change in the charging section. If Parliament had wished to say that all the income, subject to certain specific exemptions, of any company which carried on a trade or business should be subject to profits tax, it had every opportunity to say so, but it did not.

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[15] [1913] A.C. 610.

Capital compensation moneys in this case cannot produce revenue payments for the purposes of this tax. But, assuming that they can, the right to the capital compensation did not become a business asset of the company's other businesses, of any of them or of all of them together. Accordingly, the income payments cannot form part of the profits arising from those trades.

The Crown's broad assertion of law that profits arising from the trades or businesses carried on by a company are (subject to specific exceptions) equivalent to the income from all sources of the company is challenged. Admittedly it is not so in the case of an individual.

The present is a good example of a case where certain income receipts of a company are not part of the profits arising in the relevant period from the trades or businesses carried on by it. The income receipts here in question are obviously distinguishable from the income receipts from the investments in the *Liverpool and London and Globe* case.[15]

Before 1947 the colliery assets and the profits arising therefrom were assets of and profits arising from the colliery trade. The colliery profits were not profits of the other trades or any of them. Therefore, there is no justification for saying that on January 1, 1947, the right to capital compensation moneys became suddenly assets of the other trades or any of them. The quantification and time of payment of that capital compensation were very much at large and the moment of its satisfaction was uncertain and possibly remote. Moreover, under the Act of 1946 there were restrictions on the powers to dispose of the capital compensation stock even when it was received: see sections 20 (1) (*a*) and 23 of that Act. This case is totally different from that of a voluntary decision, as a matter of business policy, to sell one's colliery trade and assets, because then the purpose of the sale might be specifically shown to be to raise capital for the expansion of the other trades.

It would further be necessary to show not only that the capital compensation right was an asset of the other trades or businesses but also that the revenue payments and other interim income payments flow therefrom so as to be profits arising from the capital asset and therefore profits arising from the trade or business.

[15] [1913] A.C. 610.

The revenue payments might have no relation to any additional sum calculated as an equivalent to the interest on the compensation moneys. Taking a colliery company, the coal workings of which were coming to an end, the capital compensation might be small, but if it had been working full blast up to the last moment of its career its revenue payments might be very large. This accounts for the fact that there was no connexion between revenue payments and interim income payments. There never was any provision, even in the Act of 1949, for the revenue payments of 1947 and 1948 to be taken into account and set off against interim income payments for other years.

It is wrong in such a case as this, which is totally different from the *Liverpool and London and Globe* case,[15] to suggest that the onus is on the company to prove that the capital compensation rights, and therefore the interim income rights, did not become assets and that the income was not profits arising from any one or more of the other trades or businesses.

Section 43 of the Act of 1947 does not help the Crown's case. Although separate trades must be treated for profits tax purposes as one trade, one still has to decide in any case whether the income forms part of the profits of the notional single trade.

The appellants' second point must be based on an inference of fact to be drawn from the company's accounts from 1947 onwards. But in the case stated the accounts, except for the fact that they are exhibited, are not referred to. Before the Special Commissioners the matter proceeded on the footing that the accounts were of no relevance whatever. On this point see what the Master of the Rolls said in the Court of Appeal.[16] The immediate answer to this point is that one does not judge the taxable nature of a receipt by seeing what the recipient has done with it after he has received it. In the accounts there is no justification for saying that they show that, before the compensation capital was received, it had been made a business asset of any of these other trades, or that the revenue payments were such a business asset. Even assuming that as the revenue payments came in the company used them in the other trades by buying stock, that does not make them part of the profits arising from those trades.

As to the appellants' third point, there was no evidence on this before the commissioners.

[15] [1913] A.C. 610.

[16] [1955] Ch. 453, 471, 475; [1955] 1 All E.R. 891.

[VISCOUNT SIMONDS. Their Lordships are unanimous in thinking that this is a point which cannot be raised.]

John Senter Q.C. following. This income does not fall within the charge to profits tax. Between income tax and profits tax there is a complete difference in the concept of charge. For income tax purposes the source of tax for the payments in question is the statutory right to receive certain payments out of the consolidated fund: see section 22 (2) (*c*) and (3) (*b*) and the definition of " money payment " in section 63 of the Act of 1946 and section 1 (4) of the Act of 1949. Admittedly those payments became liable to income tax in the hands of the recipient under Schedule C. There is a totally dissimilar scheme of charging for the purposes of profits tax, so different that when profits tax started its life it was a deductible expense for income tax purposes.

The only charging provision in the Act of 1937 is section 19: see section 31 (1) (*a*) of the Act of 1947. Reliance is placed on *Kirkness* v. *John Hudson & Co. Ltd.*[17] On all the facts it cannot be said that these payments arise from any trade or business actually carried on by the company in any relevant charging accounting period. Any Act of Parliament must be read as a whole, but one cannot enlarge the scope of a charging section by reading in provisions from a computing section, though the other provisions have to be looked at if they throw any light on the scope of the charging provision. If these are not, in a strict reading, profits or gains arising from a trade or business, nothing in a computing section can bring them in: see *Fry* v. *Burma Corporation.*[18] It is an error to treat paragraph 7 or paragraph 8 of Schedule IV to the Act of 1937 as a taxing provision. Section 19 is the charging section. Section 20 provides for the computation of profits and for accounting periods. For the computation of chargeable profits it lays down the normal provision, namely, income tax principles as set out in Schedule IV. Rule 3 of the Rules Applicable to Cases I and II of Schedule D sets out in effect the deductions permitted for income tax purposes. The new profits tax code was concerned to modify this in certain ways. The references in paragraphs 7 and 8 mean that the legislature is contemplating in regard to section 19 that the profits arising from a trade or business may in some circumstances include income from investments on property. If this income is not within the charging section the respondent company cannot be

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[17] [1955] A.C. 696, 729–730; [1955] 2 All E.R. 345.

[18] [1930] A.C. 321, 327–328, 330–331.

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embarrassed because of defects in the provision for the computation of profits, which cannot affect its chargeability.

A. G. N. Cross Q.C. in reply. Since 1947 it has been the practice of the Revenue authorities to include in assessments to profits tax the income from general reserves of a company. This practice is correct: see the *Liverpool and London and Globe* case.[19] The direction in the profits tax legislation that the profits are to be computed on income tax principles refers to the principles on which the profits arising from a trade or business are computed for the purpose of income tax under Case I of Schedule D, or would be so computed if income tax were chargeable under that Case in respect of the profits, and the words are apt to cover the case either of a reserve fund taxable under Schedule D or a government annuity purchased by the company taxable under Schedule C. The legislature is in fact telling one to find out what would be the profits of the business taxable under any Schedule and then to assume that the only Schedule and Case under which they can be taxable is Case I of Schedule D. If a trading company invested part of its funds in an annuity payable by the Government and there were no Schedule C under which that could be taxed, the *Liverpool and London and Globe* case[19] shows that it could be brought into computation of the profits of the company under Case I of Schedude D. Paragraph 7 of Schedule IV to the Act of 1937 does not really add anything to section 20 and paragraph 8. Reading sections 19 and 20 and the Schedule together it is clear that one includes some income at least from investments or other property. The only way to make the whole picture consistent is to ask: is this income receipt something which would be a credit receipt on the income side in computing the profits of the business or not? and one can do that on the footing that there is no Schedule other than Schedule D, Case I, under which those profits are to be computed. Admittedly one must show that the source of the income is an asset of the business. The problem here is whether the statutory right, which is the source of the interim income, is an asset of the business carried on, as it would be if it were War Loan purchased out of the general reserves of the company.

It is not possible for a company to have an asset outside its business, short of a declaration of trust which would take the asset in question out of the beneficial ownership of the company as part of its general assets and dedicate it to some particular use. But assuming that it is possible, then, looking at what happened here, where one of the company's trades is taken over and the company becomes entitled to capital and income compensation, it is clear that if the company is to avoid paying profits tax on the interim income, the source of which is the statutory right, it must take some positive step to show that that income flowing from the right to interim income under section 19 (2) is not part of the profits of the continuing businesses. The company has lost its colliery trade, but it has a new source of income, the statutory right to interim income under section 19 (2), and, if it is theoretically possible for it to keep the produce of that source of income out of the profits of its continuing businesses, it must establish that it has withdrawn it. The accounts show that the directors made no such decision.

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[19] [1913] A.C. 610.

Their Lordships took time for consideration.

April 19. VISCOUNT SIMONDS. My Lords, this appears to me to be a very clear case, and I have no doubt that this appeal should be dismissed. That does not mean that there have not been questions raised in the course of the argument which may be extremely difficult to decide. They are not, however, necessary for the decision of this case.

The short point for determination is whether the assessment of the respondent company to profits tax for the accounting periods January 1, 1947, to December 31, 1950, ought or ought not to include certain payments made to the company under the Coal Industry Nationalization Act, 1946, and the Coal Industry (No. 2) Act, 1949.

[His Lordship stated the facts and continued:] It is now necessary to refer to the relevant provisions of the Finance Acts of 1937 and 1946, and I summarize them as follows:

Profits tax was imposed (under the title of national defence contribution) in Part III of the Finance Act, 1937 (the title being altered to profits tax by section 44 of the Finance Act, 1946). By section 19 (1) of the Finance Act, 1937, the tax was charged "on the profits arising in each chargeable accounting period . . . "from any trade or business" to which the section applied. By section 19 (2) the trades and businesses to which the section applied were "all trades or businesses of any description carried "on in the United Kingdom . . ." Section 19 (4) provides: "Where the functions of a company or society incorporated by "or under any enactment consist wholly or mainly in the holding "of investments or other property, the holding of the investments or property shall be deemed for the purpose of this "section to be a business carried on by the company or society." Subsection (1) of section 20 of the Finance Act, 1937, provides: "For the purpose of the national defence contribution, the profits "arising from a trade or business in each chargeable accounting "period shall be separately computed, and shall be so computed "on income tax principles as adapted in accordance with the "provisions of Schedule IV to this Act. For the purpose of this "subsection, the expression 'income tax principles' in relation "to a trade or business means the principles on which the profits "arising from the trade or business are computed for the purpose "of income tax under Case I of Schedule D, or would be so "computed if income tax were chargeable under that Case in "respect of the profits so arising."

The adaptations of income tax principles for computing profits made in Schedule IV include provisions allowing interest, annuities, and annual payments out of profits to be deducted (the deduction of which is disallowed under the Rules of Case I of Schedule D) and disallowing the deduction in respect of annual value of land (which is allowed for income tax under those Rules).

With regard to income received from investments or other property, paragraph 7 of the Schedule (as originally enacted) provided for the inclusion of such income in the profits in the cases therein mentioned only, such as the business of a building society or a banking business, insurance business or business consisting wholly or mainly in the dealing in or holding of investments or other property (with certain exceptions in those cases as regards certain dividends or distributions of profits and as regards income to which the person carrying on the trade was not beneficially entitled).

Subject to these and other provisions as to income from investments or other property, it was declared (in paragraph 8 of the Schedule) that "the profits shall include all such income "arising from the trade or business as is chargeable to income "tax under Case I of Schedule D, or would be so chargeable if "the profits of the trade or business were chargeable under that "Case, except income which is, or would be, exempted from "income tax by virtue of section 39 of the Income Tax Act, "1918, or section 30 of the Finance Act, 1921."

By section 31 (1) of the Finance Act, 1947, it was provided that (subject to certain exceptions) profits tax did not apply to any trade or business not carried on by a body corporate, or unincorporated society or other body. By section 31 (2) of the Finance Act, 1947, it was provided that the charge to profits tax in section 19 of the Finance Act, 1937, should not apply to any trade or business carried on by a body corporate where in the conditions therein prescribed "the actual income of the body "corporate from all sources is apportioned under or for the "purposes of section 21 of the Finance Act, 1922, and all the "persons to whom it is apportioned are individuals." By section 32 of the Finance Act, 1947, the provisions of paragraph 7 of Schedule IV to the Finance Act, 1937, with regard to investment income and income from property were varied so as to provide that in the case of all trades and businesses such income should be included in the computation of profits subject to the same exceptions as regards dividends and distribution of profits and income to which the person carrying on the trade is not beneficially entitled as were contained in paragraph 7 aforesaid. By section 43 (1) of the Finance Act, 1947, it was enacted that all trades and businesses to which section 19 of the Finance Act, 1937, applies carried on by the same person should be treated as one trade or business for the purposes of the enactments relating to the profits tax.

[His Lordship narrated the proceedings before the Special Commissioners and the decisions of Roxburgh J. and the Court of Appeal and continued:] I must at this stage mention a concession made by counsel for the present appellants in the Court of Appeal which is thus stated in the judgment of Jenkins L.J.[1]: "In this court, Mr. Russell, for the company, abandoned the "contention that the interim income payments were not income "at all, while Mr. Cross, for the Crown, abandoned the con- "tention that the claim to tax could be established merely by "showing that the interim income payments were income received "from property. It thus became common ground that the "interim income payments, whether they were or were not "income received from property, were only chargeable to profits "tax if they were profits of a trade or business carried on by the "company during the relevant chargeable accounting periods. "This must, I think, be the right view."

My Lords, I agree that this must be the right view, for it is just what the Act says, and, in so far as Roxburgh J. decided that it was enough to bring a payment within the reach of profits tax that it should be income derived from property of the company without regard to the question whether it arose from a trade or business carried on by the company during the relevant period, he was clearly wrong. But that leaves open the troublesome question what, in view of the provisions of section 20 of the Finance Act, 1937, and Schedule IV to that Act as amended by the Finance Act, 1947, are to be regarded as the profits arising from any trade or business carried on in the United Kingdom in the relevant period. This is at best a very artificial conception and the width of the new paragraph 7, which was imported by section 32 of the Finance Act, 1947, may be estimated by the apparent necessity to exclude "(*c*) income to which the persons "carrying on the trade or business are not beneficially entitled," and thus colour is given to the view that profits of a trade carried on by the company have become identified with income of any property of the company. This, notwithstanding the concession to which I have referred, was in effect the contention of the appellants. During the relevant periods, they said, the company carried on a number of trades or businesses: the payments in question were available for the carrying on of those trades or businesses in the same way as the dividends or interest on war loan or any other capital investment of the company: therefore the payments were profits arising from the trade. And they fortified their contention by reference to the accounts of the company in which the payments in question were lumped together with other trading receipts. With this latter aspect of the matter I will deal presently. My present concern is with its broader aspect, in which the source of the income is disregarded if it is available for employment in a trade, which is in effect to say that for the purpose of profits tax the income of a company is equivalent to the profits of its trade. My Lords, while I am satisfied that this is a wholly wrong view of the scope of profits tax, I am conscious of the familiar difficulty of drawing the line. That the line must be drawn somewhere is apparent (and the appellants appeared at one time to concede it) for, fundamentally, the tax is a tax on the profits of a trade or business whether, as was formerly the case, carried on by an individual or a company, or, as now, carried on by a company. And if, artificially, the income of any investments is to be treated as part of the profits of a trade, it can only be those investments which are somehow related to the trade in question. It is not, I think, necessary to state categorically that the provisions of the Schedule cannot enlarge the scope of the charging section (section 19 of the 1937 Act), for section 20, with which the Schedule must be read, can fairly be said to give an artificial meaning to the words of the charging section. But

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[1] [1955] Ch. 453, 479; [1955] 1 All E.R. 891.

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at least the dominant words, "the profits arising in each "accounting period from any trade or business," must not be lost sight of. That is why I use the vague and general words, "somehow related to the trade in question," and, doing so, am well aware that I have not yet drawn the hypothetical line. But I am unwilling to go further than is necessary for the decision of the present case. We have been told that it has been the practice since 1947 to include in an assessment to profits tax income derived from investments representing the general reserve of a trading company and having no closer association with its trade than its general availability for the lawful uses of the company, and I would not say anything to affirm or to cast any doubt upon the validity of the practice, which may be said to find its analogue in the case of *Liverpool and London and Globe Insurance Co.* v. *Bennett.*[2]

In the present case, however, there are considerations which, if they do not entitle me to say that it is sui generis, at least remove it from the generality of cases. As my noble and learned friend, Lord Radcliffe, said in *Birmingham Small Arms Co. Ltd.* v. *Inland Revenue Commissioners*,[3] "a company . . . may, "obviously, own capital or assets that are not the capital or "assets of . . . its trade or business." And if it was sought to give a conspicuous example of an asset which was not the asset of a trade or business carried on by a company, I should select a right to compensation payable at some future date in respect of a trade which it had ceased to carry on. And it is the corollary of this that any income of such an asset cannot be regarded as the income of "investments or other property" within the meaning of the new paragraph 7. The matter does not, however, rest there. For, though the payments in question are conceded by the respondents to be income for the purpose of the Income Tax Acts, it would be a misuse of language to speak of them as income of an "investment or other property." This sufficiently appears from the somewhat lengthy description of their character which I have already given. I concur in the view expressed by the Master of the Rolls that the language of sections 19 and 22 of the Coal Industry Nationalization Act, 1946, is carefully and deliberately chosen to avoid the result that the interim income is income of or from the compensation provided for in section 19 (1). It thus appears that neither is the capital asset, viz., the right to receive compensation, an asset so related to any trade or business carried on by the respondents that it falls within paragraph 7, nor, if it were, are the money payments in question "income" of that asset.

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[2] [1913] A.C. 610; 29 T.L.R. 757.

[3] [1951] 2 All E.R. 296, 303.

It remains to deal with some other contentions of the appellants. I have mentioned that they have relied on the fact that in their reports and accounts for the relevant years the respondents aggregated the payments in question with trading receipts. This contention was not raised before the Special Commissioners: no question was asked of the respondents' chairman of directors or chief accountant, who were called as witnesses at the hearing before them: the matter was mentioned only cursorily, if at all, in the Court of Appeal. Your Lordships are, therefore, without the explanation or guidance that might have been available. But I do not doubt that here first thoughts were right. For if the question is whether certain receipts of a company are profits of a trade carried on by it during a certain period the determining factor is not what use the company makes of them when received but what is the source from which they are derived. Apart, therefore, from the fact that the reports and accounts would not by themselves and without any explanation justify a conclusion adverse to the respondents, the argument that has been founded on them proceeds from the same fallacy as the main argument.

Then reliance was placed on section 43 of the Finance Act, 1947. It will be remembered that this section provided that all trades and businesses, to which section 19 of the 1937 Act applied, carried on by the same person should be treated as one trade or business for the purposes of the enactments relating to the profits tax. It was not made clear to me how this helps the argument. If the payments in question could not be computed in the profits of any one of the trades carried on by the respondents after January 1, 1947, they could not be computed in the profits of all of such trades treated as one trade. I asked in the course of the argument how, if section 43 had not been enacted, the matter would have been dealt with, that is, to the profits of which of several continuing trades the payments would have to be allocated. I got no satisfactory answer. The enactment of section 43 does not supply one. Then it was urged that, even if the colliery trade of the respondents was properly regarded for profits tax purposes as a separate trade and as having ceased on January 1, 1947, the process of ascertaining and getting in the compensation payable to them under the Coal Acts constituted a trade or business carried on by them within the meaning of section 19 (1) of the Finance Act, 1937, and the payments in question were receipts of that trade or business. This was a contention that had never been raised in any form until it found a place in the last formal reason of the appellants' case, and your Lordships were unanimous in thinking that the appellants should not be allowed to raise it. I have little doubt that in the shipwreck of their other contentions it would not have availed them as a tabula in naufragio.

In the result this appeal should, in my opinion, be dismissed with costs.

LORD MORTON OF HENRYTON. My Lords, I agree that the payments now in question, which are admittedly income receipts of the respondent company, are not "profits arising from any "trade or business" within section 19 of the Finance Act, 1937. I only desire to add that, even if I had arrived at the contrary conclusion, I should still have thought that they are not profits arising from any trade or business carried on within the relevant period. Assuming that these payments are "profits" and that they arise from a trade or business, they can only be regarded, in my view, as arising from the trade of colliery proprietors carried on by the respondent company until January 1, 1947. The Special Commissioners have found as a fact that the trade just mentioned constituted a trade separate from the other trades carried on by the company, and that that trade ceased entirely on January 1, 1947. On that date the respondent company obtained certain rights, including the right to receive the payments in question, as compensation for the loss of that trade and the assets wherewith it was carried on. It follows, to my mind, that the only trade from which the payments in question can have arisen was a trade which was not "carried on" during any part of the relevant period. I agree that the appeal should be dismissed.

LORD REID. My Lords, I concur.

LORD RADCLIFFE. My Lords, I agree that this appeal ought not to succeed.

In my opinion, the determining factor is the very special nature of the receipts involved. The Coal Industry Nationalization Act, 1946, legislated for a revolution in the coal industry of this country and in the system of ownership, management and working upon which the industry was based. It was inevitable that the far-reaching disturbance of rights which this involved should require a period of several years for the adjustment of its consequences. These interim income payments which are now in question are the product of that disturbance and adjustment, and it does not seem to me at all surprising that they cannot well be related to any of those other kinds of receipt which normally come into the accounts of a company conducting a trade or business. They are sui generis and it would, I think, lead to confusion if they were described in any terms except those which are strictly applicable to their own special circumstances.

Thus, they were paid because the nationalization statute decreed that they should be paid. They would not have been payable to the respondents if they had not been conducting a colliery business at the vesting date and in that sense, of course, they were paid to and received by the respondents for no other reason than that they had been owners of colliery assets and had been in the colliery trade. Equally, of course, the interim income payments that the respondents got were fixed either as a proportion of the profits which they had been earning in the colliery trade before the date of vesting or by a computation of interest at varying rates upon sums received from time to time by way of capital compensation. But, when all that is said, the fact remains that the only identifiable origin of the payments was the statute which authorized them and at the same time defined their terms and methods of computation.

It is natural enough that moneys paid in this way, described by their instrument of creation as "interim income," should be regarded as inherently of an income nature when the question arises of subjecting them to any tax that bears upon income as a chargeable subject. But I do not think that in any proper use of the words can they be said to arise from a source of income, in the sense that income or profits (for the moment I am not concerned with any difference between the two terms) can be said to arise from a trade or a business or an investment or some other piece of property that admits of use or enjoyment. They cannot arise from the colliery trade, for, as the case finds, that trade ceased entirely on January 1, 1947; and, short of special enactment, taxable income cannot arise in one year from a source that ceased to exist in a previous year. Nor did they arise from an investment. There was no investment until the compensation stock was issued, and any payments of interest on that stock, when received, are outside the range of payments with which this appeal is concerned. It is true that so much of the payments made as fell under section 22 (2) (*a*) of the 1946 Act was paid as "a money payment of an amount equal to interest for that

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"period" on each amount of compensation that came to be satisfied: but this amount "equal to" interest on a future sum covering the period until it was paid was not income from an investment or interest on a loan but an indemnity against loss suffered by the deferment of the payment. In fact, the bulk of the money received was received as "revenue payments" under section 22 (3) (*b*); and for the years 1947 and 1948, at any rate, these payments remained the property of the recipients, without accountability, whatever might prove to be their ultimate amount of compensation or the prescribed rate of interest upon it.

Such payments, then, do not present themselves as natural subjects of the profits tax charge. The basic subject of charge consists of "the profits arising in each chargeable accounting "period . . . from any trade or business to which this section "applies" (Finance Act, 1937, s. 19 (1)). We were rightly reminded that this is not the same thing as a charge on the income or profits of a person or company carrying on a trade or business: on the contrary, it is a charge on the profits properly attributable to a defined source. The only real difficulty that this appeal raises is that it is by no means easy to say what, in the context of profits tax, is to be understood by the words "profits arising from any trade or business." I think that they are at any rate of a wider import than might at first sight appear.

Profits tax uses the same description of the chargeable subject as was used by the excess profits tax—profits arising in any chargeable accounting period from any trade or business. On the other hand, income tax, though charging the profits arising from "trade, profession, employment or vocation," does not, so far as I know, treat a business as such as a source of taxable income. Profits tax, like excess profits tax, having described the chargeable subject, proceeds to provide in the same general way for the computation of the profits concerned: that is, they are to be computed according to the principles on which the profits arising from a trade are computed for the purposes of Case I of Schedule D or would be so computed if income tax were chargeable under that Case in respect of such profits, but subject to very considerable adaptations or modifications of those principles set out in a schedule to the taxing statute. Both profits tax and excess profits tax, therefore, imported conceptions closely related to the conceptions upon which are based assessments under Case I of Schedule D, but each contained departures from those conceptions. In particular, these taxes were able to treat the chargeable subject as a single entity, and so escaped some of the complications that are involved in the income tax scheme of assessing different items of a taxpayer's total income under different schedules and different cases of schedules and of allowing or requiring deduction of tax at source from annual payments.

Among the adaptations of income tax principles for the purposes of profits tax which were required by Schedule IV of the Finance Act, 1937, was the rule that dealt with the inclusion in profits of income from investments or other property (paragraph 7 of that schedule). The general effect of the paragraph in its original form was to say that such income should not be included in profits. On the other hand, when the tax was remodelled in 1947, its name being changed from national defence contribution to profits tax and its ambit confined to corporations, the general effect of the paragraph was reversed, and in its present form it enacts that " income received from investments or other " property shall be included in the profits " except for what is known as " franked investment income " and for income to which the recipient is not beneficially entitled (see Finance Act, 1947, s. 32).

In the High Court Roxburgh J. evidently regarded this provision as being conclusive of the case in favour of the appellants. On the other hand, in the Court of Appeal and before this House counsel for both parties concurred in treating paragraph 7 as referring only to income received from investments or other property the income from which formed part of the profits arising from the trade or business (I quote from Jenkins L.J.'s statement of the position in his judgment in the Court of Appeal). My Lords, I have never been able to feel sure that I understand what this proposition is supposed to convey. In one sense it appears to deprive paragraph 7 in its amended form of any meaning whatever except as a singularly contorted way of exempting franked investment income and non-beneficial income. I think myself that there may still be a good deal to be said for the view that the legislature, appreciating that the words " profits arising " from a trade or business " are by no means self-explanatory, as this case, among others, shows, had it in mind both in 1937 and in 1947 to lay down a positive rule as to the inclusion or exclusion of investment income which would set the question at rest for the purposes of all assessments. But I do not think that it is necessary to come to any final view on that point, because, in my opinion, the payments that we are now considering were not income of investments or other property, so that paragraph 7 does not apply to them in any event. I have already explained why they were not income from investments. By a similar process of reasoning they were not, in my view, income from property. It does not clear up the matter to say that the right to compensation—and, for that matter, the right to interim income—was a chose in action. The interim income payments did not arise from the right to compensation as income arises from income-producing property. They arose from the statute itself which decreed that they were to be paid.

The appellants' case does not, however, depend necessarily, or even primarily, on the effect of paragraph 7. For it is their general position that the respondents, being a limited company engaged in business both after 1947 and before, received the interim income payments as receipts for the credit of their business and that the payments ought accordingly to be treated as contributing to the profits arising from that business. For this purpose section 43 of the Act of 1947 has the effect of turning the separate continuing trades into one trade: but I do not think that the appellants' argument on this point is either aided or impeded by that.

I do not accept the appellants' proposition. Strictly, it means that, at any rate where profits tax is concerned, every part of the income of a company which is carrying on a business is in law income of that business. That seems to me too arbitrary. I do not think it possible to say that a company cannot own beneficially assets which do not belong to any trade or business which it conducts or that it cannot receive income beneficially which nevertheless is not income of such a trade or business. In other words, a company's business does not embrace the whole activity of being a company. But, that being said, I think it an extremely difficult undertaking to identify by a general description the kinds of income which would be at once income received by the company and not income of any trade or business which it was conducting. It is established law that the income arising from a trade, even for the purposes of an assessment under Case I of Schedule D, can properly include income the source of which is investments having no more immediate connexion with the trade than that they are held as a general reserve available for its support (*Liverpool and London and Globe Insurance Co.* v. *Bennett*[4]). It may be necessary at some time, but not now, to consider how far this decision depended, or should be treated today as depending, on the special requirements of insurance business. For there is an infinite variety in the purposes for which

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[4] [1913] A.C. 610.

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moneys reserved are translated into investments, and those purposes may range from a temporary obtaining of interest on funds shortly to be reinvested in the active conduct of the business to such special cases as the funding of a pension scheme for employees or a capital redemption reserve fund for redeemable preference shares. But for the purposes of the present appeal a general description is not required.

It is sufficient to say that, if the appellants' general proposition does not carry them home, the payments which they seek to charge in this case are not in any proper sense receipts of the respondents' continuing business.

They received them while continuing to carry on business. That is true. But what else could they do in the circumstances? They carried them into their profit and loss account as a specified item of their trading profits. In a different situation there might be importance in this. But it was not the respondents' fault that the nationalization Act had divested them of their colliery assets on the vesting date without giving them any means of stating in their accounts what equivalent value they had obtained in exchange or, accordingly, of drawing up a balance sheet or profit and loss account that could present an adequate statement of so abnormal a position. I do not, therefore, attach any significance to the accounts, even if I could, considering that no questions upon them were put to the company's witnesses when the hearing took place before the Special Commissioners.

I said before that I regard these payments as sui generis. The main feature of them which impresses me is that they were not income which arose from any disposable source under the respondents' control. I can see that, if income arises from an investment or other kind of property which can be either disposed of or retained, a company which retains the source may at any rate have to meet the challenge: "What did you keep it for "except for the purposes of your business?" But that challenge cannot be issued in this case because the effect of nationalization had been to leave the respondents with no option but to take the interim payments which the statute provided and to wait until they received their compensation to decide (so far as they were allowed to) what use they would make of it in or out of their business. In my opinion, that consideration should conclude this appeal.

LORD SOMERVELL OF HARROW. My Lords, until January 1, 1947, the respondent company carried on a colliery undertaking.

On that date the assets vested in the National Coal Board under the Coal Industry Nationalization Act, 1946, and the colliery trade of the company ceased entirely.

Under section 19 (1) of the Coal Industry Nationalization Act, 1946, compensation for the transferred interests was due on that same date. For the period between that date and the date on which compensation, having been assessed, was fully satisfied, a right to "interim income" was given by sections 19 and 22. There were to be for the first two years revenue payments equal to one-half of the ascertained revenue of the concern. With any instalments of compensation in stock or money there was to be a money payment equal to interest at a prescribed rate. There were provisions for adjustment, and the two years were extended where necessary by the Coal Industry (No. 2) Act, 1949. The details are not relevant. These interim payments were compensation for the delay after the due date in ascertaining and satisfying the principal claim for compensation.

It is now admitted by the respondent that these payments are liable to income tax. The question is whether they are "profits" for the purpose of profits tax.

The profits tax started life under the Finance Act, 1937, as the national defence contribution. Its name was changed to profits tax as from the beginning of 1947 (Finance Act, 1946, s. 44). Although there were many amendments between the Finance Act, 1937, and the Finance Act, 1947, the last Finance Act relevant to this appeal, section 19 of the earlier Act has remained the section which charges the tax. It is so described in section 31 (1) (*a*) of the Finance Act, 1947.

Under section 19 of the 1937 Act the tax is to be charged on the profits arising in each chargeable accounting period from any trade or business of any description. Under section 20 the profits arising in each chargeable accounting period are to be computed on income tax principles as adapted in accordance with the provisions of Schedule IV. The adaptations are substantial. The first question, however, to be answered is whether the sums in question can be brought within the words of the charging section. They must arise from a trade or business carried on in the chargeable accounting period.

One may well ask how the sums arising under the statute from the appropriation of the colliery undertaking could arise from a trade or business. No one suggested that the respondent made a business of having its undertakings nationalized.

The suggested answer by the appellants is ingenious. Before and after the vesting date the respondent carried on other trades which for income tax purposes were separate from the trade of the colliery. It is from the profits of these trades that the interim income payments are said to arise. On the face of it this would seem absurd. It is submitted, however, that any income received by a limited company carrying on a trade is, as a matter of law, a profit from the trade it carries on. It is said to be analogous to income from invested reserves. On the vesting of the colliery undertaking, the rights of the respondent under the Coal Industry Nationalization Act, 1946, became an asset, like a block of shares, of the other trades and any income arising under the compensation provisions of the Act became in law profits arising from the trades being carried on after that date. I agree with Jenkins L.J. that the point can be shortly disposed of. "Profits tax," he said,[5] "is charged on the profits arising from any trade or "business carried on during any given chargeable accounting "period, and not on the income from all sources of the person "carrying on any trade or business during any given chargeable "accounting period." The sums received could be used in the other trades being carried on, but arose from the rights conferred by the Coal Industry Nationalization Act, 1946.

On this basis it becomes unnecessary to consider the question whether these sums were within the words of paragraph 7 of Schedule IV, as amended by section 32 of the Finance Act, 1947. Roxburgh J. had held that these sums were within the words "income from investments or other property," relying on the words "other property." I share the doubt expressed by the Master of the Rolls on this point, but it is unnecessary to decide it.

The appellants, in the alternative, sought to rely on the respondent's accounts as showing that these sums when received were dealt with as profits of the trade. This would not, for reasons which I have stated, make them profits within section 19.

Questions arose during the course of the argument as to the extent to which the charging words would cover income from the various categories of investment income which might be held by persons carrying on various kinds of trade or business. They do not, however, arise for decision in this appeal.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Thicknesse & Hull.*

F. C.

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[5] [1955] Ch. 453, 482.

[HOUSE OF LORDS.]

H. L. (E.)*

1956
March 12,
13, 14;
April 19.

GOODRICH . . . . APPELLANT;

AND

PAISNER AND OTHERS . . . . . . RESPONDENTS.

Landlord and Tenant—Rent restriction—Shared accommodation—" Part " of house let as a separate dwelling "—Sole use by tenant of four rooms—Agreement for joint use with landlord of additional bedroom —Concurrent or consecutive sharing—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (2).

A landlord let to a tenant four unfurnished rooms on the first floor of a house "together with the use in common with the landlord of the back bedroom on the first floor," and it was further provided that the tenant should be entitled to the use (in common with the landlord) of the bathroom and lavatories. After the agreement had been signed trouble arose at an early stage because the landlord refused to allow the tenant the use of the back bedroom, locking the door. After the landlord's death, four years later, the tenant on occasions had the use of the room. In an action for possession by the landlord's successors in title, the tenant pleaded the Rent Acts, contending that she was the tenant of a separate dwelling:—

Held (*per* Viscount Simonds, Lord Reid, Lord Radcliffe and Lord Somervell of Harrow, Lord Morton of Henryton dissenting), that the stipulation for the use in common of the bedroom did not take the letting out of the protection of the Rent Restriction Acts.

Per Viscount Simonds, Lord Reid and Lord Somervell of Harrow. The words used did not amount to an agreement for the simultaneous use of the bedroom.

Per Lord Radcliffe. The tenant's right to use the bedroom in common with the landlord was too vaguely expressed to play an important part in the whole arrangement for the division of the house.

Though such cases as *Neale* v. *Del Soto* [1945] K.B. 144; 61 T.L.R. 145; [1945] 1 All E.R. 191 and *Cole* v. *Harris* [1945] K.B. 474; 61 T.L.R. 440; [1945] 2 All E.R. 146 afford a sound general guide in determining whether there is such a sharing of a living room as will take a case out of the protection of the Rent Restriction Acts, the problem must be solved in each individual case in the light of the whole arrangement and the surrounding circumstances, sharing being a matter of degree.

Decision of the Court of Appeal [1955] 2 Q.B. 353; [1955] 2 All E.R. 330 reversed.

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD RADCLIFFE and LORD SOMERVELL OF HARROW.

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GOODRICH
v.
PAISNER.

APPEAL from the Court of Appeal (Romer and Parker L.JJ., Denning L.J. dissenting).

This was an appeal from an order of the Court of Appeal dated April 27, 1955, dismissing an appeal from an order of Judge Clark at Ilford County Court dated January 13, 1955, whereby it was ordered that the respondents, Leslie Lazarus Paisner, Edward Israel Jaffe and Maurice Jaffe (trustees of the will of Samuel Raphael Jaffe, deceased) should recover possession in three months from the date thereof of four rooms on the first floor of No. 4, Mansfield Road, Ilford, Essex. The question for decision was whether a letting to the appellant, Beatrice Goodrich, comprising four rooms on the first floor of the premises, together with the right to use other parts of the premises, including a bedroom on the same floor, in common with her landlord, was a letting of a dwelling-house within the meaning of section 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and section 16 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, that is to say, whether the subject-matter of the letting was " a house let as a separate " dwelling or part of a house being a part so let."

The facts, stated by Lord Morton of Henryton, were as follows: By a memorandum of agreement dated February 1, 1950, and made between Mrs. Ethel Jaffe (therein called " the landlord ") of the one part and the appellant (therein called " the tenant ") of the other part it was agreed as follows: " 1. The landlord lets and the tenant takes all " those the four rooms now in the occupation of the tenant on " the first floor of the dwelling-house known as 4, Mansfield Road, " Ilford aforesaid (hereinafter called ' the rooms ') together with " the use in common with the landlord of the back bedroom " on the first floor on a weekly tenancy from October 31, 1949, " at the rent hereinafter mentioned. 2. The rent shall be at the " rate of £1 5s. per week. 3. During the continuance of the " tenancy the tenant shall be entitled without any payment " beyond the said rent to the use (in common with the landlord " and all others authorized by the landlord) of the bathroom and " lavatories in the said house. 4. During the tenancy the " tenant shall take reasonable care of all fixtures and fittings " in the rooms and shall not cause any damage or permit or " suffer any damage to be done to the rooms or the decorations " thereof and shall make good and pay for any damage thereto " (including accidental damage) caused by any act or neglect on "the part of herself her family or visitors and on the determination of the tenancy the tenant shall deliver up the rooms and "all the fixtures and fittings therein in a proper condition of "cleanliness. 5. The tenant shall not assign the benefit of this "agreement nor assign or sublet the rooms or any part thereof "during the continuance of the tenancy."

Mrs. Jaffe died on May 8, 1954, and thereupon No. 4, Mansfield Road became vested in the respondents, subject to the appellant's tenancy. In December, 1954, the respondents determined the tenancy by a notice to quit, but the appellant refused to deliver up possession, and on December 15, 1954, the respondents issued a plaint in the Ilford County Court claiming possession of the four rooms let to the appellant. The appellant defended the action, contending that at the time when the respondents claimed possession (which is agreed to be the relevant date) the four rooms in question were "let as a separate dwelling" within the meaning of section 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and consequently the appellant was entitled to the protection afforded by the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939.

In the county court, evidence was given by the respondents, Edward Israel Jaffe and Maurice Jaffe, and by the appellant and her daughter and son as to the use of the back bedroom and other matters. It appeared that at an early stage trouble arose because Mrs. Jaffe locked the door of it against the appellant but that none of the events which occurred before December, 1954, gave rise to any change in the rights created by the agreement.

Cyril Salmon Q.C. and *Peter Benenson* for the appellant. Although the appellant had not in fact been able to use the spare room at all before the death of Mrs. Jaffe, the judge and the majority of the Court of Appeal held that *Neale* v. *Del Soto* [1] precluded them from holding that the four rooms were "let as "a separate dwelling" so as to be protected by the Rent Acts. The questions for decision are (1) whether that case applies and (2) whether it was rightly decided.

The courts cannot import any rigid rule of law that if there is a sharing (say, of a kitchen) what is let cannot be let as a separate dwelling-house. One must look to see whether what is let is itself a separate dwelling-house. In this case what the appellant had let to her was a separate dwelling-house. *Neale*

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[1] [1945] K.B. 144; 61 T.L.R. 145; [1945] 1 All E.R. 191.

v. *Del Soto*[2] did not lay down a doctrine; it was a decision on the facts: see the holding of the county court judge. *Sharpe* v. *Nicholls*[3] shows that in each case it is a question of degree whether there is a separate letting. *Cole* v. *Harris*[4] laid down a test, but as a general guide, not as a rigid rule of law; it was not necessary for the decision of the case to lay down such a rule. If there had been a rigid rule of law that a sharing necessarily took a case outside the Acts, the court in *Sutton* v. *Begley*[5] would have found against the tenant, whose application was entirely without merits. *Stevenson* v. *Kenyon*[6] does not help the respondent. See also *Winters* v. *Dance*.[7]

From the authorities one may deduce that, although in most cases the sharing of a kitchen or living-room will take a case out of the Acts, there is no rigid rule or principle of law to that effect. The present case is a clear illustration of the circumstances in which the sharing of a bedroom does not have that effect. In all cases one must look at what is let and ask whether that letting is the letting of a separate dwelling-house. On the principle now submitted *Neale* v. *Del Soto*[8] would have been decided in the same way because what was there let was not let as a separate dwelling-house. In *Llewellyn* v. *Hinson*[9] the court did not mean to differ from what Morton L.J. said in *Cole* v. *Harris*[10] as to "essential" living rooms, narrowing the letting to include only these. It is agreed that one must look not only at what is let but at what is shared as well. *Wolfe* v. *Hogan*[11] shows that, in any view, the landlady here agreed to the four rooms let being used as a separate dwelling-house during the four years preceding her death when she excluded the appellant from the back bedroom which was to have been used in common. The fact that after her death the appellant's son occasionally used it makes no difference to the situation.

Sharing accommodation is a matter of degree. The sharing of non-essential accommodation does not take a letting out of the Acts: *Baker* v. *Turner*.[12] See also *Hayward* v. *Marshall*.[13]

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[2] [1945] K.B. 144, 145.

[3] [1945] K.B. 382; 61 T.L.R. 392; [1945] 2 All E.R. 55.

[4] [1945] K.B. 474; 61 T.L.R. 440; [1945] 2 All E.R. 146.

[5] [1923] 2 K.B. 694.

[6] (1946) 62 T.L.R. 702; [1946] 2 All E.R. 595.

[7] [1949] L.J.R. 164; 64 T.L.R. 609.

[8] [1945] K.B. 144.

[9] [1948] 2 K.B. 385; 64 T.L.R. 321; [1948] 2 All E.R. 95.

[10] [1945] K.B. 474.

[11] [1949] 2 K.B. 194; [1949] 1 All E.R. 570.

[12] [1950] A.C. 401, 421; 66 T.L.R. (Pt. 1) 780; [1950] 1 All E.R. 834.

[13] [1952] 2 Q.B. 89; [1952] 1 T.L.R. 779; [1952] 1 All E.R. 863.

The present case is very different from that of the sharing of a kitchen or bathroom. The agreement as to the sharing of the back bedroom is very vague. One cannot tell from the terms when the appellant is to have the use of it. It is impossible to spell out of this agreement the extent of the user. Therefore it is impossible to say that the back bedroom was an essential part of the tenant's dwelling. The question to be asked is always: does what is let contain the essentials of a separate dwelling-house? As to the back bedroom, one must find what was the character of the right conferred, but since the agreement is very vague on that point one can look at how the parties in fact behaved.

In summary: the essential question is: is what is let let as a separate dwelling? One must look at the agreement and also at the facts, e.g., the character of the rooms let. One must ask oneself: does what is let in fact contain the essentials of a separate dwelling, or is what is let a separate dwelling only if one includes with it the other rights and valuable conveniences which the tenancy agreement also confers? One's dwelling is the place where one eats and sleeps and cooks and puts one's feet on the fender. The rooms let to the appellant contain all those essentials of a separate dwelling. It is impossible to say that the nebulous right to share the back bedroom was an essential part of the make-up of the appellant's dwelling. The four rooms were let as a separate dwelling and the majority of the Court of Appeal would have so held, had they not conceived themselves to be bound by authority. *Neale* v. *Del Soto*[14] and *Sharpe* v. *Nicholls*[15] were decisions on the facts and laid down no principle of law. *Cole* v. *Harris*[16] was meant as a guide to help county court judges to decide these cases, but it was not intended to lay down a rigid rule that the sharing of a kitchen, bedroom or sitting-room must take a dwelling-house out of the scope of the Rent Acts. The four rooms were "let as a separate dwelling" within section 12 of the Rent and Mortgage Interest (Restrictions) Act, 1920.

Peter Benenson following. Whatever was to be the use of this back bedroom, it could not be the appellant's bedroom. One can only find what it was to be by examining the surrounding circumstances. So far as the agreement goes, it might have been intended that it should be used by the appellant, not as a bedroom but for the purpose of storing clothes. Accordingly, one must have regard to what happened in fact. When the proceedings were brought the appellant's son was using the room to sleep, on the average, three nights a week. This was not such a sharing as would destroy the protection of the Rent Acts.

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[14] [1945] K.B. 144.

[15] [1945] K.B. 382.

[16] [1945] K.B. 474.

Neil Lawson Q.C. and *George Avgherinos* for the respondents. Before dealing with the questions of principle it is proper to consider certain aspects of the facts and their implications in the application of the legal principles. This case has been bedevilled by the term "spare bedroom." The evidence shows that whereas the bedroom might have been considered as "spare" from the point of view of the landlady, it was certainly not "spare" from the appellant's point of view. The appellant was providing accommodation for her son and daughter. The son was to come there on leave from national service and live with her there when it was over. That is different from letting a tenant use a spare bedroom to put up his parents if they are coming merely on a visit. Because of the vagueness of this agreement one must look at the surrounding circumstances. From these it appears that the appellant was to have the use of this room as her son's bedroom and the landlady was to have the use of it as she required it.

Where there is let to a tenant a part of a house of which he has exclusive possession and also the use in common with the landlord of another part of the house, the true test is to ask and answer two questions: (1) Is the tenant at all material times using living accommodation, of which he has not exclusive possession, for living purposes? (2) If he is, then, is that user pursuant to a right of common user with the landlord which is conferred by the tenancy agreement or which is the subject of a contract ancillary or collateral to the tenancy agreement?

Certain users, such as having access to the public lounge of a block of flats, do not amount to a sharing of accommodation so as to destroy the protection of the Acts. All previous authorities have approached the matter on the basis of the totality of the tenant's rights under the agreement made with him. In the present case the user of the back bedroom by the son was not casual or occasional.

If one adopts the appellant's test to see whether the accommodation let provides the essential manifestations of living, the problem, taking the subjective test, is what are the needs of the tenant? Even on that test the appellant cannot succeed. One must approach the matter through the facts of the case. One cannot say that because the rooms not shared would be enough for a hypothetical tenant, they were enough for this tenant.

These common rights, though vague, are valid legal rights and are capable of being enforced. As to the remedies available to enforce them, see per Romer L.J. in the Court of Appeal.[17] See also *Stevenson* v. *Kenyon*[18] and *Turner* v. *Baker*.[19] In considering when or for what period the appellant was entitled to go to the bedroom, the court would have to have regard to the intentions of the parties at the time when the agreement was made and the facts on which an injunction was sought. For example, if the landlady had merely locked the door of the room, not using it herself, the court would have had no difficulty in enforcing the appellant's rights. It is conceded that there would have been more difficulty if declaratory relief had been asked for.

The right to use bathrooms and lavatories passes with the demise, although in a sense it is a personal right: see section 15 of the Act of 1920, and sections 7 and 8 of the Landlord and Tenant (Rent Control) Act, 1949, where it is assumed that sometimes shared accommodation may not exclude the Acts, and that *Neale* v. *Del Soto*[20] is right.

Reliance is placed on *Llewellyn* v. *Hinson*,[21] *Baker* v. *Turner*,[22] *Cole* v. *Harris*[23] and *Stevenson* v. *Kenyon*.[24]

A man occupying a bedroom with a chair and a sofa and a television set, using this room separately and able to lock the door would not have a separate dwelling. The test is: does the accommodation supply all the essential manifestations of living for the tenant at a particular time? For this purpose living accommodation is limited to that which is needed for living purposes. Bathrooms and lavatories are ancillary. It cannot be accepted as fundamental that a bathroom is always used every day. There are thousands of lettings where there is no bath or bathroom and the tenants go out to public baths. Bathing is not necessarily a thing which persons do in their homes. A tenant occupying a bed-sitting room with his own bathroom and lavatory would enjoy the letting of a separate dwelling whether he ate his meals at a restaurant or had the right in common with other tenants to take them in a dining-room in another part of the house. But if his right was to use accommodation in common with other tenants to prepare and eat his own food, there would not be a protected tenancy, having regard to the totality of his rights: see *Rogers* v. *Hyde* [25] and *Hayward* v. *Marshall*.[26] No court has ever applied the test suggested by the appellant.

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[17] [1955] 2 Q.B. 355, 361–362; [1955] 2 All E.R. 330.

[18] 62 T.L.R. 702, 703.

[19] [1949] 1 K.B. 605, 611; 65 T.L.R. 373; [1949] 1 All E.R. 560.

[20] [1945] K.B. 144.

[21] [1948] 2 K.B. 385, 391.

[22] [1950] A.C. 401, 414, 430, 436.

[23] [1945] K.B. 474, 483, 485.

[24] 62 T.L.R. 702, 704.

To see whether this bedroom was essential living accommodation one must take the case of this actual tenant and see whom she was accommodating and how she proposed to do it.

In applying the correct test one must ask first: was the tenant at the material time using living accommodation in the house, of which he had not got exclusive possession? One distinguishes this from the common use of ancillary accommodation such as bathroom and lavatory. As to the question of the essential manifestation of living, see *Wimbush* v. *Cibulia*.[27] The appellant wants to say that it is only a right to share " essential " living accommodation that defeats protection, but the right test is simpler. The expression " essential " is vague. It comes into the test in this way, that in determining what is a living purpose one may (as in *Hayward* v. *Marshall* [28]) say that living accommodation for the purposes of this case is for the essential manifestations of living, but it is not right to couple the adjective " essential " with living accommodation. It is not necessary to disturb *Cole* v. *Harris*.[29]

Next, it must be considered whether the user in question is pursuant to a right of common user being part of the tenancy agreement or an agreement ancillary or collateral to it. Hence the user by the tenant was pursuant to a right. This flows from the authorities and is in conformity with the language of section 7 of the Landlord and Tenant (Rent Control) Act, 1949. If one goes back to the beginning of the evolution from *Neale* v. *Del Soto* [30] there was here what amounted to an agreement for the sharing of the dwelling-house.

County court judges have been acting for years on the exposition of *Neale* v. *Del Soto* [30] in *Baker* v. *Turner* [31] and landlords and tenants have adjusted their relations on that basis.

The material time to decide whether what is let to a tenant is let as a separate dwelling is the institution of the proceedings. The court must look at the totality of the rights granted to the tenant. If they include the right to use living accommodation in common with the landlord, then he has not got part of a house let to him as a separate dwelling. The test must be related to the requirements of the particular tenant. Here the common use of the bedroom was required by the tenant for the purposes of living for the persons for whom she was making a home.

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[25] [1951] 2 K.B. 923; [1951] 2 All E.R. 79.

[26] [1952] 2 Q.B. 89, 96, 99.

[27] [1949] 2 K.B. 564; 65 T.L.R. 583; [1949] 2 All E.R. 432.

[28] [1952] 2 Q.B. 89.

[29] [1945] K.B. 474.

[30] [1945] K.B. 144.

[31] [1950] A.C. 401.

George Avgherinos following. The Rent Acts deal with small dwellings and it is desirable to lay down simple tests to be applied to an infinite variety of circumstances. This was no doubt present to the mind of the Court of Appeal in *Sharpe* v. *Nicholls* [32] and *Cole* v. *Harris*.[33] If one of the rooms which the tenant uses is not exclusively let to him there cannot be a separate dwelling. The underlying principle is that the tenant's dwelling consists of all the rooms which he is entitled to use for living purposes. One tenant may be able to make do with the rooms which are exclusively let to him, while another may also require to use an additional room which he shares. Here the appellant needed additional accommodation as a bedroom for her son.

Assuming that one is driven by the circumstances to take the user of the shared room as being successive and not contemporaneous, what is shared (if anything) is the user of that room, the landlord having possession and control. The fact that there may be successive user by the landlord and the tenant makes no difference: see *per* Romer and Parker L.JJ. in the Court of Appeal.[34] In *Winters* v. *Dance*,[35] although the room shared was so small that there could only be successive and not simultaneous user, the rule in *Neale* v. *Del Soto* [36] was applied. Unless there are good reasons for rejecting that doctrine, it should be applied here. The test suggested on behalf of the appellant was: does what is let contain the essentials of a separate dwelling? That is very difficult to apply in practice, and in the Rent Acts "let" means "demised," the tenant getting exclusive occupation as a tenant.

What were let here were bare unfurnished rooms giving little or no indication of the purpose to which they would be put, which depended on the tenant's needs. Even a single room can be adapted to contain all the essentials of a separate dwelling. The question is: does one approach the matter from the point of view of the particular tenant or does one apply an objective test? What if the tenant's needs change? Take the case of the tenant of a flat who is prepared to sleep in the one bedroom let to her with her grown-up daughter, but sometimes, under the tenancy agreement, her small son is allowed to sleep in a spare bedroom in the house with the landlord's small son. The Rent Acts would not apply to that case, though, applying the objective test, the flat let contained all the essentials of a separate dwelling.

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[32] [1945] K.B. 382.

[33] [1945] K.B. 474.

[34] [1955] 2 Q.B. 353, 360–361, 365.

[35] [1949] L.J.R. 165.

[36] [1945] K.B. 144.

The objective and the subjective tests cannot stand together, and to apply the former one must disregard *Neale* v. *Del Soto*.[37] Sometimes, admittedly, the two tests might lead to the same result. The test is the need of the tenant at the time of the making of the tenancy, and for that one must look at the agreement.

It is a non sequitur to say that because this tenant was not allowed to use the bedroom in question while the landlord lived, it was a mere ancillary convenience, for if meanwhile her son had to sleep on a sofa in the living room, that bedroom was still necessary for the tenant's requirements.

The tenant's right was to use this bedroom in common with the landlord. The right was unqualified as to time, and, if the landlord chose to grant the right in that form, the tenant had the right to use the room at all times provided she did not keep the landlord out. The agreement must be construed contra proferentem. There was nothing in the agreement to exclude contemporaneous or simultaneous user. It was also obviously contemplated that the furniture there should stay there. If the landlord did not choose to limit the right of the tenant, the tenant might use the room so long as she did not exclude the landlord. The landlord might sleep in it every night of the year and so might the tenant's son.

This was not a spare bedroom from the tenant's point of view and that is the essential view in this case.

Cyril Salmon Q.C. in reply. One must look at the four rooms let and say whether they constitute a separate dwelling. That is the test according to the wording of the Act. To apply the test one must look at the words themselves and at the agreement. If the actual user is looked at it must be to resolve an ambiguity in the agreement or else in a case like *Wolfe* v. *Hogan*[38] one must see whether the rooms were let as a separate dwelling. One cannot say that these four rooms were not let as a separate dwelling because of the added convenience of the user of the other room from time to time. One must construe the agreement sensibly and it cannot be construed so as to give the tenant's son the right to sleep in the room at the same time as the landlady.

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[37] [1945] K.B. 144.

[38] [1949] 2 K.B. 194.

It would be very convenient if one could formulate a rigid rule which any judge could apply to get the right answer, but one can only provide a general guide and leave its application to the judge's good sense and judgment; he must look at the agreement and the nature of the rooms let and decide whether or not this was a letting as a separate dwelling. What was meant as a general guide in *Neale* v. *Del Soto* [39] should not be elevated to the rank of a doctrine. The conception of a living room introduced by *Cole* v. *Harris* [40] prevents the sharing of a lavatory and bathroom from taking a letting out of the ambit of the Rent Acts. This is not necessarily because they are not living rooms. In one sense they are an essential part of a dwelling-house. But what might be essential in Belgrave Square is not essential in Bermondsey. The Acts are dealing with tenancies in a very low-priced range in which lavatories and bathrooms for separate use are not essential. One must look at the class of dwelling to which the Acts are intended to apply. Such sharings do not mean that the tenant is not in possession of a separate dwelling of that class.

There is a distinction between sharing a kitchen, as in *Neale* v. *Del Soto*,[41] and the sharing of this bedroom. The sharing of the kitchen is a matter of daily routine, because both parties must eat every day, while no one could suppose that the right construction of this agreement was that the parties should sleep in this bedroom together. In the ordinary use of language a tenant would not regard what he had as a separate dwelling unless he had a separate kitchen. No rigid formula can be devised and nothing more can be done than to lay down a general guide. It is fallacious to say that once there is a right to use a living room in common a dwelling is necessarily taken out of the Acts.

Their Lordships took time for consideration.

April 19. VISCOUNT SIMONDS. My Lords, the facts of this case and all the relevant authorities are so fully examined in the opinion of my noble and learned friend, Lord Morton of Henryton, which I have been privileged to read, that I can state my own views very briefly.

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[39] [1945] K.B. 144.
[40] [1945] K.B. 474.
[41] [1945] K.B. 144.

In my opinion, this appeal should be allowed, but in coming to that conclusion I have been influenced solely by the unusual nature of the tenancy agreement which we have had to consider. I do not wish to cast any doubt upon the correctness of the decisions of the Court of Appeal in *Neale* v. *Del Soto*[1] or *Cole* v. *Harris*,[2] and what have been called their satellite cases. Nor, if any formula must be found, can I think of a better one than that stated by my noble and learned friend and approved by MacKinnon L.J.,[3] viz., that to create a demise of part of a house as a separate dwelling "there must be an agreement by "which the occupier has the exclusive use of the essential *living* "rooms of a separate dwelling-house." But this can at best be only a general guide. The contrast to the "exclusive" use of a living room by one person is that it is shared by him with another. And at once the question arises what constitutes a sharing for this purpose. It would, I think, be in conformity with the decisions of the Court of Appeal in the many cases which have come before it, if I said that a sharing involves the right of simultaneous use of a living room in such a manner that the privacy of the landlord or tenant, as the case may be, is invaded. Upon this point I concur in the opinion of my noble and learned friend, Lord Reid, which also I have had the advantage of reading. Turning to the present case, I find that the tenant has in addition to the four rooms let to her, which by themselves would undoubtedly be a part of a house "let as a separate "dwelling," also "the use also in common with the landlord of the "back bedroom on the first floor," and I ask whether this is such a sharing of a living room as to exclude the operation of the Rent Acts.

My Lords, I must admit that I find great difficulty in giving any effect in law to these words. It may well be that they are too vague to be enforceable. But, in any event, I cannot suppose that they create a right in the tenant at any time and at all times to enter and occupy the bedroom. It is, I think, presupposed that there will be some further arrangement by which there will be not simultaneous user but separate user at successive times, in fact such user in common or sharing as will not involve the invasion by the one of the privacy of the other. If so, it would not, I think, be proper to conclude that, because the appellant has such a right in addition to the four rooms demised to her, she was not the tenant of a separate dwelling and entitled to the protection of the Act.

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[1] [1945] K.B. 144; 61 T.L.R. 145; [1945] 1 All E.R. 191.

[2] [1945] K.B. 474; 61 T.L.R. 440; [1945] 2 All E.R. 146.

[3] [1945] K.B. 474, 479.

I would allow the appeal.

LORD MORTON OF HENRYTON stated the facts and continued: My Lords, in the county court evidence was given by two of the respondents and by the appellant and her daughter and son as to the user of the "back bedroom" and other matters, but it is clear that none of the events which happened before December, 1954, gave rise to any change in the rights created by the agreement of 1950. Consequently, your Lordships have only got to consider whether, by that agreement, the "four rooms on the "first floor" were or were not let to the appellant as a separate dwelling. The county court judge held that they were not so let. In his judgment he posed two questions: "1. Is there under this "contract a sharing of some room not actually included in the "tenancy? and 2. If so, 'is that room part of the essential "'living accommodation?' (*per* Jenkins L.J., *Hayward* v. "*Marshall*[4])." The learned judge then continued: "I felt that "both must be answered in the affirmative. A bedroom, in my "view, is clearly part of the essential living accommodation of a "dwelling. Accordingly, I held this to be a *Neale* v. *Del Soto*[5] "case and made an order for possession." The appellant appealed to the Court of Appeal, and Denning L.J. would have allowed the appeal, but Romer and Parker L.JJ. felt bound to dismiss it, having regard to the case of *Neale* v. *Del Soto*[5] and other authorities.

In these circumstances, my Lords, it is convenient to turn at once to the relevant authorities, and I trust I may be forgiven if I quote freely from my own judgments, for reasons which will become apparent as I proceed. In *Neale* v. *Del Soto*,[5] by an oral agreement, the landlord, Mrs. Del Soto, sublet to the tenant Neale two unfurnished rooms in a house containing seven rooms of which she was the lessee. The agreement provided for the use by the tenant, jointly, with the landlord, of the garden, kitchen, bathroom, lavatory, coal-house and conservatory. The standard rent of the house was such as to bring it within the Rent Acts. The tenant applied to the county court, under section 12 (3) of the Act of 1920, for an apportionment of the standard rent. The county court judge dismissed the application, holding that the letting was not a letting of part of a house as a separate dwelling within section 12 (2) of the Act of 1920. His decision was upheld in the Court of Appeal, and I said, in a judgment with which Scott and Finlay L.JJ. agreed[6]: "Were the two rooms in "question in the present case a part of a house let as a separate "dwelling? In my view, they were not. What was let was the "two rooms together with the use, in common with the landlord, "of the garage, kitchen, bathroom, lavatory, coal-house and "conservatory, and it would be a misuse of language, to my "mind, to say that the two rooms, and nothing more, were let "as a separate dwelling. The real substance of the matter was "that there was a sharing of the house. Each party had the "exclusive use of some rooms and the two parties together had "the use in common of other rooms." Later I observed: "It was suggested in the course of the argument for the tenant "that, if the county court judge's decision is upheld, the result "might follow that a letting of two rooms, together with the use, "in common with the landlord, of, for instance, a w.c., would "be outside the Act. I am content to leave that matter to be "dealt with if, and when, it arises, but it may be—I express no "view on the matter—that this question is one of degree and, "as the judge below observed in his judgment, in the present "case a very substantial part of the dwelling was shared, "including such a very important room as the kitchen." *Neale* v. *Del Soto*[7] was the first reported case in which it was held that a tenant having the exclusive use of part of a house was outside the scope of the Rent Acts if he shared certain other accommodation with the landlord.

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[4] [1952] 2 Q.B. 89, 96; [1952] 1 T.L.R. 779; [1952] 1 All E.R. 663.

[5] [1945] K.B. 144.

Four months later the Court of Appeal (MacKinnon and Lawrence L.JJ. and myself) had to consider the case of *Sharpe* v. *Nicholls*.[8] In that case the county court judge had made an order for possession "subject to plaintiff allowing defendant a "Rent Act protected tenancy of the front two rooms, together "with joint use of kitchen and out-offices." The Court of Appeal, following *Neale* v. *Del Soto*,[9] held that such a tenancy would not be a "protected tenancy." It is to be noted that the only accommodation to be shared was the kitchen and the "out-offices." Next came *Cole* v. *Harris*,[10] where the Court of Appeal had to consider a letting of a living room, bedroom and

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[6] [1945] K.B. 144, 147.
[7] [1945] K.B. 144.
[8] [1945] K.B. 382; 61 T.L.R. 392; [1945] 2 All E.R. 55.
[9] [1945] K.B. 144.
[10] [1945] K.B. 474.

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kitchen, of which the tenant had exclusive use, together with the use, jointly with the landlord and another tenant, of a combined bathroom and w.c. on the first floor and of the garden for drying clothes and storing coal. Thus the situation arose which had been foreseen in *Neale* v. *Del Soto*,[11] and it became necessary to decide whether a sharing of any accommodation, whatever its nature, took the case out of the protection of the Acts, or whether a distinction could be drawn between sharing a kitchen and sharing a combined bathroom and w.c. MacKinnon L.J. and I thought that the case was distinguishable from *Neale* v. *Del Soto*,[11] and I expressed my reasoning in the following words[12]: " I think that the true test, where the tenant has the exclusive " use of some rooms and shares certain accommodation with " others, is as follows: there is a letting of part of a house as a " separate dwelling, within the meaning of the relevant Acts if, " and only if, the accommodation which is shared with others " does not comprise any of the rooms which may fairly be " described as 'living rooms' or 'dwelling rooms.' To my mind " a kitchen is fairly described as a 'living room,' and thus " nobody who shares a kitchen can be said to be tenant of a part " of a house let as a separate dwelling. In many households the " kitchen is the principal living room, where the occupants spend " the greater part of the day. Very often it is the warmest part " of the house and the family tend to congregate there for that " reason. On the other hand, both the bathroom and the w.c. " are rooms which are only visited on occasions for a specific " purpose, and I think they may fairly be classed with such a " room as a box-room, though no doubt it is not visited so often. " I think that this test gives a reasonable construction to the " Acts, and one which is in accordance with their general scheme " and intention." MacKinnon L.J. expressed his agreement with this reasoning as follows[13]: " It is, I think, difficult to formulate " any principle of law which separates what I have called the " contrasted conceptions of (1) a demise of part of a house as a " separate dwelling, and (2) an agreement to share the use and " occupation of a house. But I think Morton L.J. provides the " best formula by saying that to create (1) there must be an " agreement by which the occupier has the exclusive use of the " essential *living* rooms of a separate dwelling-house. After all, " a dwelling-house is that in which a person dwells or lives, and " it seems reasonable that a separate dwelling should be one

[11] [1945] K.B. 144.

[12] [1945] K.B. 474, 485.

[13] Ibid. 479.

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"containing essential living rooms. A w.c. may be essential in "modern days, but I do not think it is a living room, whereas a "kitchen, I think, is." It is to be observed that MacKinnon L.J., in quoting my "formula" with approval, introduced the word "essential," which did not appear in my judgment, but in subsequent cases I do not think any distinction has been drawn between a "living room" and an "essential living room."

The test suggested in *Cole* v. *Harris* [14] has been applied in a number of reported cases and has, no doubt, been applied in very many cases in the county court which have not been reported. As Denning L.J. put it in the present case,[15] after referring to *Neale* v. *Del Soto* [16] and *Cole* v. *Harris*,[17] ". . . the contest ever since has been whether the sharing falls "on the *Neale* v. *Del Soto* [18] side of the line or on the *Cole* v. "*Harris* [19] side." I shall next refer to two cases in which the test was considered in the Court of Appeal. In *Stevenson* v. *Kenyon*,[20] the use of the kitchen was granted only "for the "purpose of cooking" and the Court of Appeal was invited to distinguish the case from *Neale* v. *Del Soto* [21] on this ground. The court unanimously rejected this invitation and I said [22]: "To my mind, ingenious though the argument is, we should be "introducing an unwarrantable extra refinement into the test "which has already been laid down by this court if we accepted "that argument. After all, the primary purpose of a kitchen is "for cooking, and in this case there is no doubt that the use "of the kitchen, at any rate for that primary purpose, was shared "by the parties."

In *Llewellyn* v. *Hinson*,[23] the two appellants were the respective tenants of two flats on the second floor of a dwelling-house in Birmingham. The annual rateable value of each flat was such as to bring it within the Rent Acts. Each appellant had the exclusive possession of certain rooms, but each was granted in addition the joint use of certain other rooms, namely, a bathroom, w.c. and kitchen. Asquith L.J., in giving the judgment of the court, said [24]: "The issue is whether on these facts, each of "the appellants had let to him a part of a house let as a separate "dwelling. The learned county court judge held that they did

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[14] [1945] K.B. 474.

[15] [1955] 2 Q.B. 353, 358; [1955] 2 All E.R. 330.

[16] [1945] K.B. 144.

[17] [1945] K.B. 474.

[18] [1945] K.B. 144.

[19] [1945] K.B. 474.

[20] 62 T.L.R. 702; [1946] 2 All E.R. 595.

[21] [1945] K.B. 144.

[22] 62 T.L.R. 702, 704.

[23] [1948] 2 K.B. 385; 64 T.L.R. 321; [1948] 2 All E.R. 95.

[24] [1948] 2 K.B. 385, 391.

"not: and he based his decision on the authority of *Neale* v. "*Del Soto*[25] and the Court of Appeal cases following and interpreting that decision. The question is whether he was right in "so holding. We think he was right. The court cannot consider "whether *Neale* v. *Del Soto*[25] and its satellite cases were "properly decided. It can only inquire what they in fact "decided. About this there can, in our view, be little doubt. "The gist of those decisions is that where what the landlord "under the agreement of tenancy parts with to the tenant "consists of two things (*a*) exclusive possession of a room or "rooms, plus (*b*) user, jointly with someone else, of another room "or other rooms which come under the description of a living "room or living rooms, then the tenant cannot say that he is the "tenant of a 'house let as a separate dwelling or part of a house "'being a part so let.' The ratio decidendi is that the 'dwelling' "of the tenant on the facts assumed consists of the totality "constituted by (*a*) plus (*b*): and that part of the totality is not "'separately' let to him, because the possession or user of it is "to be shared by him with another: a state of affairs which is "inconsistent with the words 'separately,' and indeed with the "word 'let' for both of these terms connote exclusive possession "or enjoyment."

It is convenient next to refer to the Landlord and Tenant (Rent Control) Act, 1949, section 7 whereof is as follows: "Where under any contract—(*a*) a tenant has the exclusive "occupation of any accommodation, (*b*) the terms on which he "holds the accommodation include the use of other accommodation in common with his landlord or with his landlord and other "persons, and (*c*) by reason only of the circumstances mentioned "in paragraph (*b*) of this section, the accommodation referred to "in paragraph (*a*) thereof is not a dwelling-house to which the "principal Acts apply, the Act of 1946 shall apply to the contract "notwithstanding that the rent does not include payment for the "use of furniture or for services." It is unnecessary, for the present purpose, to quote the terms of the Act of 1946. The importance of section 7 of the Act of 1949 lies in the recognition by Parliament of the fact that even if a tenant has the exclusive occupation of some accommodation, his tenancy may be taken out of the protection of the Rent Acts if the terms on which he holds the accommodation include the use of other accommodation in common with his landlord, or with his landlord and other persons. The section does not specify the nature of the user in common

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[25] [1945] K.B. 144.

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which would have this result, but it is, I think, a fair inference that the legislature had in mind the test laid down in *Cole* v. *Harris* [26] and its restatement in *Llewellyn* v. *Hinson*.[27]

In *Baker* v. *Turner* [28] the *Neale* v. *Del Soto* [29] line of cases came to the attention of your Lordships' House. The facts in that case were that in a dwelling-house which was subject to the Rent and Mortgage Interest Restrictions Act, 1939, the tenant sublet a furnished bed-sitting room with use of kitchen. The landlord obtained an order for possession of the entire premises on the ground that after that subletting neither the part sublet nor the part retained was let as a separate dwelling-house. Counsel for the tenant said [30]: "The correctness of the decision "in *Neale* v. *Del Soto* [31] and the cases following it is not "challenged. It is conceded that, on account of the sharing of "the kitchen, the sub-tenant has not a separate dwelling." He went on to argue that nevertheless the tenant who had sublet had a separate dwelling. In these circumstances it was not necessary for this House to decide whether or not the *Neale* v. *Del Soto* [31] line of cases were rightly decided, but each of their Lordships referred to that line of authority. Two short passages from the speeches may be quoted. Lord Porter said [32]: "The "main results of decisions may, I think, be tabulated as follows: "(1) A portion of a house which is let by a landlord to a tenant, "even if in itself separate, ceases to be a separate dwelling or to "be protected by the Acts if the terms of the letting contain a "provision that the tenant shall have the right of using a living "room belonging to the landlord: *Neale* v. *Del Soto*.[33]" Lord Porter went on to summarize the effect of the decisions in *Cole* v. *Harris*,[34] *Llewellyn* v. *Hinson* [35] and *Kenyon* v. *Walker*,[36] and added [37]: "The material time at which it has to be determined "whether the house is protected or not is the moment when the "action is brought: *Prout* v. *Hunter*,[38] and *Remon* v. *City of* "*London Real Property Co. Ltd.*[39]" Lord Reid [40] referred to *Neale* v. *Del Soto* [41] and *Llewellyn* v. *Hinson* [42] and continued:

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[26] [1945] K.B. 474.
[27] [1948] 2 K.B. 385.
[28] [1950] A.C. 401; 66 T.L.R. (Pt. 1) 780; [1950] 1 All E.R. 834.
[29] [1945] K.B. 144.
[30] [1950] A.C. 401, 405.
[31] [1945] K.B. 144.
[32] [1950] A.C. 401, 414.
[33] [1945] K.B. 144.
[34] [1945] K.B. 474.
[35] [1948] 2 K.B. 385.
[36] 62 T.L.R. 702.
[37] [1950] A.C. 401, 414–415.
[38] [1924] 2 K.B. 736; 40 T.L.R. 868.
[39] [1921] 1 K.B. 49; 36 T.L.R. 869.
[40] [1950] A.C. 401, 437.
[41] [1945] K.B. 144.
[42] [1948] 2 K.B. 385.

"In these cases it was held that no separate dwelling had been "let. I have no doubt that these decisions are correct. If a "tenant has to share with another person a living room which "is not let to him, it is in my view impossible to find anything "which is let to him as a separate dwelling. It cannot be the let "rooms plus the right to use the other room, because that other "room is not let to him at all—he is only a licensee there. "And it cannot be the let rooms alone, because his having to "share another room shows that the let rooms are only a part "of his dwelling place." I venture to think that this passage from Lord Reid's judgment states the ratio decidendi of the *Neale* v. *Del Soto* [43] line of cases more accurately than the passage already quoted from the judgment of the Court of Appeal in *Llewellyn* v. *Hinson*.[44]

My Lords, two questions emerge from these authorities, questions which have not yet been decided by this House. First, were the cases of *Neale* v. *Del Soto* [45] and *Cole* v. *Harris* [46] rightly decided? I understand that your Lordships are all of opinion that they were, and I need only say that I share that opinion. I now turn to the second question, does the test suggested in *Cole* v. *Harris* [46] meet with the approval of this House? It was suggested in the course of the argument that in *Cole* v. *Harris* [46] the Court of Appeal attempted to lay down a rule of law. I think it is more accurate to say that the majority of that court expressed a view as to the true construction of section 12 (2) of the Act of 1920, and in so doing supplied a test for the assistance of the county court judges, on the frequent occasions when it would fall to their lot to determine whether particular premises were or were not let as a separate dwelling.

For my part, after carefully reconsidering the *Cole* v. *Harris* [46] test and the reasoning on which it was based, so clearly stated by my noble and learned friend, Lord Reid, in *Baker* v. *Turner*,[47] I am of opinion that the test is a sound and useful one, based on a correct interpretation of the language of section 12 (2) of the Act of 1920. It is, however, a fair criticism of the test that it throws no light upon what is generally to be considered as a living room. In view of your Lordships' approval of *Neale* v. *Del Soto* [48] it is clear that a kitchen is to be considered as a living room, and it seems to me that (to quote the expressive language used by Mr. Salmon in the course of his argument)

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[43] [1945] K.B. 144.
[44] [1948] 2 K.B. 385.
[45] [1945] K.B. 144.
[46] [1945] K.B. 474.
[47] [1950] A.C. 401.
[48] [1945] K.B. 144.

"a living room is a room wherein you cook, eat, sleep and put "your feet on the fender." In other words, a kitchen, a dining-room, a bedroom and a sitting-room are living rooms in the ordinary sense of the word. It is to be noted that in *Baker* v. *Turner*[49] both Lord Porter and Lord Reid used the phrase "a "living room" without the adjective "essential," and I do not think that adjective is particularly appropriate. Some people find it possible to cook, eat, sleep and spend their leisure time in one and the same room. If there is a sharing in any living room, prima facie the letting is outside the Acts. But sharings may differ widely in kind and degree; the test must be applied with due regard to the facts of each case and, in particular, to the nature and extent of the rights of user granted to the tenant over the living room. A recent instance of a case where a letting was held to be "separate," although the tenant was given a limited right of user of the kitchen, is *Hayward* v. *Marshall*.[50] One tenant of unfurnished rooms had the right to draw water in the kitchen, and to use the gas stove in the kitchen once a week for the purpose of boiling her washing, but had no other right to use the kitchen. Another tenant had only the right to draw water in the kitchen. I agree with the reasoning which led the Court of Appeal to decide that in each case there was a separate letting, and I also agree with the reasoning which led the Court of Appeal to reach the opposite conclusion in *Winters* v. *Dance*,[51] where the right granted was to use what was called a kitchenette "in "common with the landlord," with no restriction as to the nature of the user. In the former case the position was similar to the position when a tenant is granted the right to use a bathroom. The latter case was, in my view, indistinguishable from *Neale* v. *Del Soto*,[52] the so-called kitchenette was merely a small kitchen.

I think that in using the words "as a separate dwelling" Parliament must have had in mind the awkward situations which might arise if a landlord had to share a living room, for an indefinite time, with a tenant whose tenancy had been determined by notice; and the intention of Parliament was, in my view, carried out in each of the two cases just cited.

The test suggested in *Cole* v. *Harris*[53] has been applied in many cases and has been stated, in terms which certainly did not indicate any disapproval, in your Lordships' House in *Baker* v. *Turner*.[54] Further, although I cannot suggest that the test was expressly approved by Parliament in the Act of 1949, it was at least recognized that some forms of sharing would take a letting outside the Act. There must, I think, be many tenancies in existence today which have been granted on the footing that this test was the right one.

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[49] [1950] A.C. 401.

[50] [1952] 2 Q.B. 89.

[51] [1949] L.J.R. 165; 64 T.L.R. 609.

[52] [1945] K.B. 144.

[53] [1945] K.B. 474.

It was, however, suggested in the course of the argument that the test now under consideration led to a wrong approach to the problem, and that the court must look at the character of the rooms let for the separate occupation of the tenant and ask: "Do the rooms so let in fact contain the essentials of a separate "dwelling, or is what is let a separate dwelling only if you "include with it the other rights or conveniences which the "tenancy agreement confers?" My Lords, I cannot accept this suggestion. The letting for separate occupation is usually, as in the present case, simply a letting of one, two or more rooms. These rooms will be either unfurnished or sparsely furnished, having regard to the terms of the proviso to section 12 (2) of the Act of 1920, as amended by section 10 (1) of the Act of 1923, whereby the Rent Acts do not apply to a dwelling-house bona fide let at a rent which includes payments in respect of the use of the furniture, if the amount of rent which is fairly attributable to the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent. The use to which the rooms are put may vary from time to time at the will of the tenant. Whatever the rooms may look like at any particular time, it is impossible to tell merely by looking at them whether they are or are not *let as* a separate dwelling. The only way in which this can be finally determined is to look at the rooms whereof the tenant is given the use in common with the landlord or others. To quote again the words of Lord Reid in *Baker* v. *Turner*[55]: "If a tenant has to share "with another person a living room which is not let to him, it "is in my view impossible to find anything which is let to him "as a separate dwelling . . . his having to share another room "shows that the let rooms are only a part of his dwelling place."

So far, my Lords, I have been dealing, I fear at very considerable length, with questions of wide general importance, on which the courts will look to your Lordships for guidance. I now turn at last to the consideration of the case now under appeal.

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[54] [1950] A.C. 401.

[55] Ibid. 437.

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It would appear that this is the first occasion on which the courts have had to consider a case in which the tenant is given user of a bedroom in common with the landlord. I recognize that in the majority of such cases the arrangement contemplated would be one under which the landlord and tenant would each have the separate use of the bedroom for periods to be mutually agreed between them, but there might well be cases where a contemporaneous user was contemplated. For instance, it might be intended that two beds should be placed in the bedroom, one to be occupied by a woman landlord (if that is not a contradiction in terms) and the other by a woman tenant, perhaps for the sake of company. Again, it might be intended that one bed should be occupied by a son of the landlord and the other by a son of the tenant. In the present case the words are "together "with the use in common with the landlord of the back bedroom "on the first floor." There is nothing in the agreement which limits or defines in any way the nature of the user.

I think this is essentially a case in which the success of the "use in common" must depend on the good nature and good sense of the parties concerned, and in fact trouble arose at an early stage because Mrs. Jaffe locked the door against the appellant. Surely, my Lords, this is just the kind of letting which was intended to be excluded from the Acts, so that a common user should not continue indefinitely against the will of one of the parties. The fact that the nature and extent of the use in common is not defined at all makes the domestic situation more awkward. If only a defined and limited use had been granted to the tenant, it might have been possible to treat the case as being on the same footing as *Hayward* v. *Marshall.*[56] As it is, I find it impossible to distinguish the case from *Neale* v. *Del Soto*[57] and numerous other cases in which the tenant has been granted the use of a kitchen "in common with" or "jointly with" the landlord. I cannot regard it as a sufficient distinction that the use in common of a kitchen would more often involve contemporaneous user than the use in common of a bedroom. As Parker L.J. said in the Court of Appeal[58]: "There is no express "stipulation for exclusive user by the tenant for any period, and, "indeed, on the face of the agreement there is nothing to prevent "a contemporaneous user."

In my opinion the majority of the Court of Appeal came to the right conclusion and this appeal should be dismissed.

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[56] [1952] 2 Q.B. 89.

[57] [1945] K.B. 144.

[58] [1955] 2 Q.B. 353, 365.

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LORD REID. My Lords, section 12 (2) of the Rent Act of 1920 provides that the Act shall apply to a house or a part of a house let as a separate dwelling and the question is whether the premises let to the appellant were let as a separate dwelling. The only reason why the Rent Acts are said not to apply is that under the agreement of February 1, 1950, the landlord let to the appellant, in addition to four rooms and the use of the bathroom and lavatories, "the use in common with the landlord of the back "bedroom on the first floor." It is said that this involves "sharing" a living room and prevents the premises from being held to be let as a separate dwelling.

In my opinion, this agreement does not give the parties a right to occupy the bedroom at the same time. No doubt the terms of an agreement might be such as to confer such a right: it was suggested in argument that a landlord and tenant might agree to their children sharing a bedroom in this way. But in any ordinary case the objections to a landlord and tenant or members of their households sharing a bedroom are so obvious that I would not be prepared to hold that a let of several rooms together with the use in common of a bedroom means that there is to be such sharing unless there were something to indicate that that was the parties' intention. Use in common can also mean that the parties have each the right to the exclusive use of the room from time to time and, in my opinion, that is the meaning here. It is true that there is no provision for determining which is to have the preference at any particular time, but the parties are expected to behave reasonably. In the event of a disagreement the tenant might find it difficult to enforce her right, but I think that the intention to be inferred from the agreement was that each should have the exclusive use for approximately equal periods if desired.

I have no doubt that a right to share a living room in the ordinary sense puts the tenancy outside the protection of the Acts and for this reason. The use of the words "let as a "*separate* dwelling" in section 12 (2) shows that some tenants of dwellings are to be protected and others not. Parliament could not be unaware of the domestic difficulties which might arise if an indefinite right to remain in possession were given to tenants who had a right to invade the privacy of another home. If a dividing line is to be drawn one would expect it to exclude tenants who have a right to the daily use of a living room simultaneously with members of another household, and I think that the words "let as a separate dwelling" do clearly exclude such tenants.

On the other hand, it was notorious that very many thousands of tenants of what would otherwise be entirely separate dwellings had to use a w.c. in common with other households. These tenants would be the last whom one would expect Parliament to exclude from the protection of the Acts and only the clearest words would make me accept the position that Parliament must be held to have intended to exclude them. I think that if any ordinary person were asked whether a tenant of a self-contained flat without conveniences but with a right to use a w.c. in common was the tenant of a separate dwelling, he would unhesitatingly answer "Yes."

There are a great many intermediate stages between the tenant who has the right to share in the daily use of a living room and the tenant who only shares the use of a w.c., and I do not think there can be any test of universal application other than the intention of the Act as gathered from its words. No court is entitled to substitute its words for the words of the Act.

But a court can and must decide what is the appropriate test in a particular case and, when the Court of Appeal has laid down a test, that test ought to be followed in all cases which do not present substantial relevant differences. The Court of Appeal laid down such a test in *Cole* v. *Harris*.[59] I think that for all ordinary cases that test is in accordance with the intention of the Act, and, even if I had doubts about it, so many lettings must have taken place with it in view that I would not depart from it. But that does not mean that the words used by the Court of Appeal are to be treated as if they were words in an Act of Parliament. In substantially different circumstances they are only a guide and not a rule. How far they are applicable must be considered in any case where the facts are substantially different in a relevant respect.

The right to share the use of a living room may be of a limited character and then it must be a question of degree whether it prevents the tenant's premises from being let as a separate dwelling. In *Hayward* v. *Marshall*[60] a very limited right to use the kitchen was held not to have that result, and I think that this decision was right. It appears to me that when one comes to a case where the circumstances are unusual one must go back to the Act. The circumstances of the present case are unusual and I think that an appropriate question to ask here is whether the tenant's right to use the bedroom involves a great invasion of the privacy of the landlord's home, as in the case of a right to the daily use of a living room simultaneously with the landlord and his family, or a comparatively small invasion, as in the case of a right to use a bathroom and w.c. in common. I do not say that that would be the right question to ask oneself in all unusual cases: I cannot foresee what they might be. But in this case there is no true sharing: there is really no invasion of the landlord's privacy involved in the exclusive use of this bedroom, be it for a day or a week or a month. There is far more involved in the daily use of a bathroom or w.c. in common. It is true that the use there is also not simultaneous, but I do not think that that is the only thing to consider. Domestic difficulties can easily arise with regard to the use in common of a bathroom and w.c. in a way in which they could not arise with regard to the use of this bedroom, say, week about; but it has been held, and I think rightly, the right to use these facilities in common does not put the case outside the Act. I am not conscious that anything that I have said is in conflict or hard to reconcile with what was said in *Baker* v. *Turner*.[61] That was a case where the subtenant had an ordinary right to share in the use of a room. This is not such a case. I am of opinion that this appeal should be allowed.

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[59] [1945] K.B. 474.

[60] [1952] 2 Q.B. 89.

LORD RADCLIFFE. My Lords, when this case was before the Court of Appeal, the three members of the court differed in their views. Whereas one of them thought that Mrs. Goodrich's four rooms were "let as a separate dwelling" within the meaning of the Rent Restriction Acts and that it was open to him in law so to decide, the other two came to the conclusion that they were precluded by what is called the principle laid down in *Neale* v. *Del Soto*[62] from treating them as a separate dwelling. But for their understanding of what that principle required they would have taken a different view. Romer L.J. arrived at his decision with regret, regarding it as unfortunate and saying[63] "were we "able to approach this case unfettered by authority my strong "inclination would be to hold that the four rooms which were "let to the tenant constituted a separate dwelling for the purpose "of the Acts"; while Parker L.J., who also expressed his reluctance to dismiss Mrs. Goodrich's appeal, stated that, apart from authority, he would have had little doubt that what was let to her was a separate dwelling.

[61] [1950] A.C. 401.

[62] [1945] K.B. 144.

[63] [1955] 2 Q.B. 353, 362.

It looks, therefore, as if something might have gone astray in the application of the principle of *Neale* v. *Del Soto* [64] and that, as at present understood, that principle is capable of producing results which are fairly regarded as unjust. If so, it appears to me that your Lordships are bound to indicate what it is that seems to you to be amiss, even though in so doing you may weaken the force of what has seemed hitherto to be a satisfactory and convenient rule.

But then, what is the principle of *Neale* v. *Del Soto* [64]? The first difficulty is that there is nothing in that decision itself which is inimical to the success of the appeal in this case. What it involves is that, if some part of a house is let unfurnished separately from the rest of the house, that part is not necessarily to be treated as let as a separate dwelling. That surely must be good law. The court must take into account any further arrangements between landlord and tenant which are relevant to the question whether the part let is let in the capacity of a separate dwelling. In *Neale* v. *Del Soto* [64] the sum of the arrangements amounted, in the court's view, to a sharing of the house itself between the two persons concerned: and, on that view of the facts, a situation in which part of the house was let as a separate dwelling had not arisen.

What circumstances amount to such a sharing of the house as to negative the constitution of a separate dwelling must be a question of degree. That also was envisaged by the *Neale* v. *Del Soto* [64] decision. But, if the statute leaves it unresolved by what tests the question of degree is to be determined, I do not think that it is open to the courts to make a law for themselves to the effect that if certain conditions laid down by them are found to exist, then it is impossible for there to be a letting as a separate dwelling under the Acts. And that, I think, is the trouble to which the later extensions of the principle of *Neale* v. *Del Soto* [64] have led and is the trouble responsible for Mrs. Goodrich's predicament in this case.

For, when *Cole* v. *Harris* [65] came to be decided, the decision of the majority of the members of the Court of Appeal was expressed in these words: ". . . there is a letting of part of "a house as a separate dwelling, within the meaning of the "relevant Acts if, and only if, the accommodation which is "shared with others does not comprise any of the rooms which "may fairly be described as 'living rooms' or 'dwelling rooms.'" A test of that sort may be (and, I am sure, has been) very helpful in deciding the question of degree that has to be solved afresh in every individual case: I daresay, too, that the significance which *Cole* v. *Harris* [66] attached to common user of a kitchen corresponds with good sense in most cases. But, on the other hand, it seems to me impossible to say that such a test can be presented as a construction of the actual statutory phrase "let "as a separate dwelling," and it is no reflection on it to say that it does not appear to me to be completely satisfactory as an exhaustive statement of the relevant issue. It substitutes for what is, I think, the better test, as approved in *Neale* v. *Del Soto*,[67] whether the divided house is in substance shared, the inquiry what is the kind of accommodation that is "shared" in common. For this purpose, "shared" is not altogether a happy expression, as has already been pointed out by this House in *Baker* v. *Turner* [68] (see, for instance, *per* Lord Normand [69]). It tends to obscure the fact that the degree of sharing may vary from case to case, where rights of joint or common user are concerned, and the degree of variation may well be relevant in considering whether there is a separate dwelling. *Hayward* v. *Marshall* [70] affords an instance of this and, in my view, the present case affords another.

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[64] [1945] K.B. 144.

[65] [1945] K.B. 474, 485.

Secondly, it cannot always be clear what ought to be treated as a "living room" for this purpose. The complexities of individual situations and requirements are infinitely various, since patterns of living themselves vary so much, and what is important or even essential for one occupant of rooms separately let may be unimportant or unnecessary for another. I cannot myself frame any formula which in this context necessarily embraces a kitchen but necessarily excludes a bathroom. The difficulty has led to attempts to speak of "essential living rooms" or "essential "manifestations of living": but I am bound to say that these glosses seem to me either to beg the question or to confuse the issue. And I am afraid that I cannot see anything more satisfying in the definition offered during the course of argument in this case: "A living room is a room wherein you cook, eat, sleep and "put your feet on the fender." Why ever should courts of law tie themselves down in this way?

As I see it, the truth is that a living room is not something which can be identified objectively without regard to the situation of its particular occupant, occupants or users. What, indeed,

[66] [1945] K.B. 474.
[67] [1945] K.B. 144.
[68] [1950] A.C. 401.
[69] Ibid. 422.
[70] [1952] 2 Q.B. 89.

may be a living room if in single occupation, as, for instance, a kitchen, is not necessarily a living room if it has to be made available for the use of several distinct households: and I should say the same of a bathroom and, again, of a spare bedroom.

In my opinion, therefore, the question whether Mrs. Goodrich's four rooms were let as a separate dwelling is not solved merely by predicating that the bedroom of which a right of common user was given was, objectively, a "living room" and then concluding that since there was common user of it there could not be a letting of the other rooms as a separate dwelling. That seems to me, with all respect, to put the emphasis of this case in the wrong place. It seems to me that the first and most important thing is that under the tenancy agreement Mrs. Goodrich obtained the exclusive possession of four unfurnished rooms on the first floor of the house, which rooms she was in fact already occupying; and the next thing is to inquire whether, giving due weight to that fact, which certainly suggests the constitution of a separate dwelling, the suggestion is negatived by the fact that she also enjoyed the common use of a back bedroom on the first floor and the bathroom and lavatories in the house. Of course, there can be difference of opinion about the right answer to give to that question, not because these are questions of degree: but, in my view, the whole arrangement did not amount to a sharing of the house between the two ladies or of those parts of it which between them they enjoyed separately or in common. I do not think that the right to use the bathroom and lavatories negatives the letting of the four rooms as a separate dwelling, or that the right to use the back bedroom, taken by itself or together with the other right, alters the situation. For myself, I do not know what is the exact legal consequence of a tenant's right to use a bedroom in common with his landlord: if the parties themselves do not define the right with more precision or work it out by current give and take, I very much doubt whether the law can supply any rules that will define it for them. But the only relevance which I see in that is that a right so vague ought not to be treated as playing any important part in the whole arrangement about the division of the house.

I agree that the appeal should be allowed.

Lord Somervell of Harrow. My Lords, in *Neale* v. *Del Soto*[71] the county court judge held that a letting of two unfurnished rooms in a house, together with the use, jointly with the landlord, of the kitchen, bathroom, lavatory, garage and other rooms, was not a letting of part of a house as a separate dwelling within section 12 (2) of the Act of 1920. The Court of Appeal decided that he had not made any error of law in so holding.

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[71] [1945] K.B. 144.

It follows that where in addition to rooms let there are in the one agreement rights of joint user, the living facilities must be considered as a whole. In *Cole* v. *Harris* [72] the county court judge came to the conclusion that *Neale* v. *Del Soto* [73] laid down the principle that " the sharing of any part of the accommodation " included in the tenancy contract which is essential to the con- " ception of a dwelling-house, according to ideas held at the " present day, prevents the letting from being a letting of a " part of a house as a separate dwelling." The court held that *Neale* v. *Del Soto* [73] laid down no such principle. The shared user was of a bathroom and w.c. It was thought, no doubt rightly, that there were many " separate dwellings " in the ordinary sense where lavatory accommodation was shared. A test was suggested which has been elaborated and applied in later cases. There must not, it was said, be a sharing of any of the rooms which may fairly be described as living rooms or dwelling rooms. This may well be a useful guide, but each case must, I think, be considered by the tribunal of fact in the light of the words of the Act. Two contrasted cases will make my difficulty clear. A single room in a small house is let unfurnished with the right to share the landlord's meals in the landlord's dining room. I would have said the single room was not let as a separate dwelling. On the other hand, the decision might be different if there was a common room in which meals were provided for the tenants of a number of separate one-room flats with their own front doors.

One has in each case to consider the agreement as a whole with any relevant surrounding circumstances. Is the alleged tenant a lodger with the exclusive use of some of the rooms in the house, or is he a tenant, giving words their ordinary meaning, of a separate dwelling, with ex hypothesi certain additional rights of joint user.

In the present case I cannot construe the words as contemplating a joint and contemporaneous user of the bedroom. The rights are so vague that they may be unenforceable. At the highest they could not confer a greater right than a user for six months in the year at periods within the control of the landlord. Having regard to all the facts, including the number of rooms

[72] [1945] K.B. 474, 476.

[73] [1945] K.B. 144.

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let, I do not think that the rights over this fifth room lead to the conclusion that the appellant was not the tenant of a separate dwelling. It must in each case, as my noble and learned friend, Lord Morton of Henryton, suggested in *Neale* v. *Del Soto*,[73] be a question of degree. I would allow the appeal for the above reasons, which are substantially those given by Denning L.J.

Appeal allowed.

Solicitors: *Richardson, Sowerby, Holden & Co.; Paisner & Co.*

F. C.

[73] [1945] K.B. 144.

J. C.*
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Dec. 11.

MOHAMEDALY ADAMJEE AND OTHERS . APPELLANTS;

AND

HADAD SADEEN AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon — Land — Prescription — Onus of proof — Partition decree — Obtained by fraudulent collusion — Decree conclusive against all persons—Claimant to prescriptive title—Entitled to damages only —Duty of court in partition action to investigate title—Duty of appeal court where investigation inadequate—Partition Ordinance, No. 10 *of* 1863 (*Legislative Enactments of Ceylon,* 1938 *Rev., c.* 56), *s.* 9—*Prescription Ordinance, No.* 22 *of* 1871 (*Legislative Enactments of Ceylon,* 1938 *Rev., c.* 55), *s.* 3.

By section 9 of the Partition Ordinance, 1863, of Ceylon: "The "decree for partition or sale . . . shall be good and conclusive "against all persons whomsoever, whatever right or title they have "or claim to have in the said property . . . ; Provided that nothing "herein contained shall affect the right of any party prejudiced "by such partition or sale to recover damages from the parties by "whose act . . . such damages had accrued."

By section 3 of the Prescription Ordinance, 1871, proof by a plaintiff of undisturbed and uninterrupted possession of immovable property by a title adverse to that of the defendant for 10 years previous to the bringing of the action entitles the plaintiff to a decree in his favour, "Provided that the said period of 10 years "shall only begin to run against parties claiming estates in "remainder or reversion from the time when the parties so claiming "acquired a right of possession to the property in dispute."

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* *Present*: EARL JOWITT, LORD OAKSEY, LORD COHEN, LORD KEITH OF AVONHOLM and MR. L. M. D. DE SILVA.

Pursuant to the provisions of the will of the testator there was conveyed to his daughter by deed in 1888 certain immovable property in Colombo subject to a condition in the will that she, her issue or heirs should not sell, mortgage or alienate the property but should hold it in trust for her grandchildren. In 1949, the daughter and her children being then all dead, a partition action was begun by seven of her grandchildren against her 36 other grandchildren, the 43 grandchildren between them (the present respondents) claiming to be all the persons interested in the property. A decree for sale having been made in the partition action, the appellants, who were not parties to that action, and who claimed to be entitled to the property as successors in title of a person who had acquired it under a registered fiscal's conveyance—which did not set out the restrictions on the daughter's power to deal with the property contained in the conveyance of 1888—executed in 1916 as a result of mortgage proceedings against the testator's daughter, thereupon in 1950 instituted the present proceedings, pleading that they and their predecessors in title had been in the sole and uninterrupted and undisturbed possession of the property from 1916 and that they had prescribed to the property, and they claimed to have the decree in the partition action set aside as null and void, or, alternatively, damages. It was found by the trial judge that the respondents had acted fraudulently and collusively in failing to make the appellants party to the partition action or to give them any notice of it:—

Held, first, following a long line of authority in Ceylon, for which justification could be found in the language of section 9 of the Partition Ordinance, that a partition decree was conclusive against all persons whomsoever, including a person whose title to an interest in the land partitioned had been concealed from the court by fraudulent collusion between the parties to the partition action. Accordingly, the appellants were not entitled to have the partition decree set aside, and their only remedy was in damages.

Nono Hami v. *De Silva* (1891) 9 S.C.C. 198 and *Jayawardene* v. *Weerasekera* (1917) 4 C.W.R. 406 applied.

Dictum of Ennis J. in *Fernando* v. *Marsal Appu* (1922) 23 N.L.R. 370 not followed.

A paramount duty is cast upon the court by the Partition Ordinance to ascertain by a proper investigation of title who are the actual owners of the land sought to be partitioned before entering a decree which is good and conclusive against the world. And, further, on an appeal in a partition action if it appears to the Supreme Court that the investigation into title has been inadequate it should, of its own motion if necessary, and acting under its powers of revision, set aside the decree and make an order for proper investigation.

Mather v. *Tamotharam Pillai* (1903) 6 N.L.R. 246, 250 approved, and observations made indicating steps to be taken by the court in investigating title.

Held, secondly, that the appellants under the Prescription Ordinance had acquired a good title to the property and were entitled to be compensated by way of damages to the full extent of the value of the property as a whole at the date of the commencement of the proceedings, namely, Rs.100,000.

As a matter of construction, once parties relying on prescription had brought themselves within section 3 of the Prescription Ordinance, the onus rested on anyone relying on the proviso to that section to establish their claim to an estate in remainder or reversion at some relevant date, and they could not discharge that onus unless they established that their right fell into possession at some time within the period of 10 years.

Chelliah v. *Wijenathan* (1951) 54 N.L.R. 337 considered.

Judgment of the Supreme Court of Ceylon (1954) 56 N.L.R. 345 varied and damages increased.

APPEAL (No. 24 of 1955) from a judgment of the Supreme Court of Ceylon (February 10, 1954) affirming a judgment of the District Court of Colombo (March 4, 1952) whereby the present appellants were awarded as plaintiffs Rs. 29,687/50 as damages under the proviso to section 9 of the Partition Ordinance.

The action out of which this appeal arose related to certain immovable property consisting of land with buildings and plantations thereon at Kollupitiya, Colombo, formerly owned by one I. L. Idroos Lebbe Marikkar, who died on May 8, 1876, leaving a will dated December 12, 1872. It was decided by the Privy Council in *Sitti Kadija* v. *De Saram* [1] that the will created a fidei commissum in favour of the children and grandchildren of the immediate beneficiaries under the will, namely, the children of the deceased and his widow.

Under a division effected in the terms of the will the property in question was conveyed by deed to one Savia Umma, a daughter of the deceased. The respondents are grandchildren of Savia Umma. The property was subsequently sold in execution against Savia Umma and was purchased by one Leonora Foneska and conveyed to her. Later the property was sold and conveyed by Leonora Fonseka to Adamjee Lukmanjee, the present appellants' grandfather.

On the above facts, ownership of the property in question was claimed on the one hand by the appellants by virtue of, inter alia, the conveyance to Adamjee Lukmanjee and subsequent devolution of his title on the appellents, and, on the other hand, by the respondents as the surviving grandchildren of Savia

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[1] [1946] A.C. 208.

Umma (all her children being dead), they being the ultimate fidei commissarii under the will.

The principal issues for determination on this appeal were: (1) whether the decree in certain partition proceedings between the respondents, which was necessarily in conflict with the appellants' alleged title to the property, could be set aside and declared null and void on the ground that the appellants were not given notice of the partition proceedings and were not parties thereto; and (2) whether the appellants had established a title to the property by prescription.

The District Court of Colombo (L. B. de Silva A.D.J.) rejected the appellants' claim to set aside the decree in the partition proceedings, but awarded them Rs. 29,687/50 damages, and his judgment was affirmed on appeal to the Supreme Court of Ceylon (Gunasekara J. and K. D. de Silva J.).

1956. Oct. 29, 30, 31; Nov. 1. *Sir Lynn Ungoed-Thomas Q.C.*, *Raymond Walton*, *Eric Amerasinghe* and *Lakshman Kadirgamar* for the appellants. The general nature of the questions which arise is: (1) whether a decree in a partition action obtained by fraud can be set aside by the appellants who were not parties to the action. That raises the further question whether such decree obtained by fraud is conclusive within the meaning of section 9 of the Partition Ordinance, 1863, under which the partition decree was made. (2) The perfectly distinct question whether the decree was made with or without proper investigation of title; the appellants say that it was made without proper investigation of title and on that ground the decree is not conclusive against all persons whomsoever within the meaning of section 9. (3) In either case, whether a separate action is the appropriate procedure for dealing with the matter. (4) Whether by reason of the registration in accordance with the provisions of the Land Registration Ordinance, 1891, and the Registration of Documents Ordinance, 1927, of the deeds made for valuable consideration through which the appellants claim title to the property and the lack of registration of any document through which the respondents claim title thereto, the title of the appellants to the land and premises prevails over that of the respondents and the appellants are entitled to the entirety of the property free from the fidei commissum affecting it and not merely to one-sixteenth of it, which is the part which Savia Umma was entitled to on intestacy; and, therefore, assuming that the partition decree cannot be set aside, whether the damages should be Rs.100,000, being the value of the whole property, or the Rs.29,687 which was in fact awarded. The Rs.29,687 is made up of two items, Rs.23,437 were in respect of improvements which the appellants had made to the property, and Rs.6250 for the one-sixteenth share. There is no dispute as to these figures; it is merely on the question of the principle to be adopted. The final question is whether the appellants had established a title by prescription, and this turns on the District Judge's findings and the result of those findings; the point is whether the onus lies on the respondents to show that the prescription period has not run, or whether it lies on the appellants to show that it has run against the respondents, the position being that the respondents are the ultimate beneficiaries under the fidei commissum and therefore come under the provisions of the Prescription Ordinance, 1871, applicable to remaindermen and reversioners.

If the appellants succeed on registration or prescription it would mean that they are entitled to the whole of the land or damages in lieu of it. If there is an intestacy—if the will and the conveyance to Savia Umma are to be treated as non-existent —then the appellants are entitled on an intestacy to the one-sixteenth that Savia Umma had, and in addition to the fifteen-sixteenths because they have a prescriptive title.

On the first question—that of fraud—it is submitted that the decree in the partition action was obtained by fraud and can be set aside by the appellants who were not parties to, and without notice of, it, and any authority to the contrary is wrong and ought not to be followed. That raises the point whether such a decree obtained by fraud is conclusive within section 9 of the Partition Ordinance. The relevant English case on the effect of fraud is *Earl of Bandon* v. *Becher*,[2] and the Ceylon cases are *Adoris* v. *Perera*[3] and *Almeda* v. *Disanayaka*.[4] A decree obtained by fraud or in breach of duty to the court is not a decree which is conclusive within the meaning of section 9 of the Partition Ordinance. If it is to be held that the decree is conclusive in the case of fraud, it might happen that the court would then be expected to carry out its decree knowing that the parties are fraudulent. That the court is to be made an instrument for the purpose of carrying out what it itself knows is fraudulent is an extremely strong interpretation of the Ordinance and one which should not be adopted. Fraud is not mentioned in section 9 at all; the section is directed to title. Admittedly *Nono Hami* v. *De Silva*[5] and *Jayawardene*

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[2] (1835) 3 Cl. & F. 479, 509.

[3] (1914) 17 N.L.R. 212, 213.

[4] (1948) 49 N.L.R. 257, 260.

[5] (1891) 9 S.C.C. 198.

v. *Weerasekera*[6] are against the submission of the appellants here and support the conclusiveness of the partition decree. It is not an adequate remedy to substitute damages in the present case; it is erroneous in principle. *Samarakoon* v. *Jayewardene*[7] was founded on fraud, but went on irregularities. *Fernando* v. *Marsal Appu*[8] treats as open the present submission.

With regard to the second point—that of investigation of title—the questions are (i) whether a decree made without proper investigation of title is conclusive within section 9; and (ii) whether there was a proper investigation of title in this case. It is the statutory duty of the court to examine the title so as to be satisfied that all possible claimants to the property are manifestly before it, and this examination requires careful investigation and clear proof. Strict proof requires at least (a) production of birth and death certificates, (b) an investigation of the register of encumbrances, and (c) an inquiry into possession of the land. None of those three things was in fact done in this case. There was here no independent inquiry at all. If there is no proper investigation of title the decree is not conclusive within section 9. Cases bearing on investigation are: *Mather* v. *Tamotharam Pillai*,[9] *Umma Sheefa* v. *Colombo Municipal Council*,[10] *Golagoda* v. *Mohideen*[11] and *Kumarihamy* v. *Weeragama*.[12] There is no express provision as to how the investigation is to be made. It is not enough to accept the word of the parties; a reasonably independent investigation of title must be made.

As to third point—whether a separate action was the appropriate procedure—*Perera* v. *Wijewickreme*[13] is relied on; it deals specifically with the particular form of remedy. [*Aserappa* v. *Weeratunga*[14] was also referred to.]

On the fourth point—the effect of the registration of the appellants' documents of title and the non-registration of those of the respondents—the appellants are entitled to the entirety of the property and not merely to the one-sixteenth to which Savia Umma was entitled on intestacy. The respondents had no title under the will as against the appellants—that follows from the wording of section 7 (1) of the Registration of Documents Ordinance, 1927, which provides that "An instrument . . . shall unless "it is duly registered . . . be void as against all parties claiming

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[6] (1917) 4 C.W.R. 406.
[7] (1909) 12 N.L.R. 316, 319.
[8] (1922) 23 N.L.R. 370.
[9] (1903) 6 N.L.R. 246, 249, 252.
[10] (1934) 36 N.L.R. 38, 42, 47.
[11] (1937) 40 N.L.R. 92.
[12] (1942) 43 N.L.R. 265, 268.
[13] (1912) 15 N.L.R. 411, 413.
[14] (1911) 14 N.L.R. 417, 420.

"an adverse interest thereto on valuable consideration by virtue "of any subsequent instrument which is duly registered . . ." The will being of no effect for want of registration, the appellants are entitled to the one-sixteenth to which Savia Umma was entitled on intestacy, and the claim of the other heirs of the testator is barred on intestacy under the Prescription Ordinance. What passed to the appellants under the conveyance from Fonseka was the whole property. [Reference was made to *Fonseka* v. *Cornelis*,[15] *Ellapata* v. *Fernando*[16] and *Fonseka* v. *Fernando*.[17]] If reliance has to be placed on the conveyance to Savia Umma, it is void quoad their adverse interest: section 17 of the Land Registration Ordinance, 1891. If the appellants did not have notice of the deed they are not fixed with notice, and if their deeds are registered, then the entire deed is void as against them. On the point of "notice," see *Aserappa* v. *Weeratunga*.[18]

If the appellants are entitled to only one-sixteenth, that must be on the basis of intestacy, because the will and the conveyance are "washed out" for lack of registration. Looking at the position on intestacy, Savia Umma has conveyed one-sixteenth of the estate to the appellants, and as to the remaining fifteen-sixteenths the appellants have been in occupation of this property for more than 10 years before action as required by the Prescription Ordinance; no question of fidei commissum arises; they are prescribing as on intestacy and prescribe against the heirs and that is an end of the matter.

With regard to prescription—the last point—the question is whether the appellants have established a title by prescription, which, as a result of the judge's findings, turns on whether the onus of proof is on the respondents to show that the prescription period has not run against them as fidei commissarii, or on the appellants to show that it has run. It is purely a question of burden of proof and depends on the construction of section 3 of the Prescription Ordinance, 1871. It is submitted that in the circumstances the onus lies on the respondents to show that the prescription period has not run against them and that the appellants have not acquired a title to the property by prescription, and they have not discharged that onus. [Reference was made to *Cadija Umma* v. *S. Don Manis Appu*,[19] *Raki* v. *Lebbe*[20] and *Chelliah* v. *Wijenathan*.[21]] There is no need, contrary to the

[15] (1917) 20 N.L.R. 97, 108.

[16] (1922) 24 N.L.R. 175, 177.

[17] (1912) 15 N.L.R. 491, 492.

[18] (1911) 14 N.L.R. 417, 420.

[19] [1939] A.C. 136, 142.

[20] (1912) 16 N.L.R. 138, 140.

[21] (1951) 54 N.L.R. 337, 342.

Supreme Court's view in the present case, for the appellants to show the starting point of their possession; all that they need show is the adverse possession during 10 years. The only period in section 3 that is relevant is 10 years before action.

Ralph Millner and *J. Bisschop* for the 17 respondents who appeared. The judgment appealed from is right on all points. The fraud and collusion alleged against the respondents was that they concealed from the court that the appellants were in possession and claimed title. The appellants' title could only have been as to one-sixteenth. All the facts were considered by the trial court, which took into account fully all that the appellants had done and gave them the benefit of the improvements and the rents and profits.

The first point taken for the appellants was that the partition decree could be set aside by reason of fraud. It is submitted that simply as a matter of construction of section 9 of the Partition Ordinance and the proviso the case in which the decree has been obtained by fraud or collusion is included. The present is a case where, even if there is fraud, the partition decree should stand against all parties. The proviso uses the widest possible words—" by whose act whether of commission or omission "—and covers everything. If it had been intended to exclude the case of fraud it would have said so; the words of the proviso are apt to include such a case, and, indeed, fraud is the most obvious case which would spring to the mind in considering the proviso. The proviso does not create a new right, but merely preserves a right which already existed—the right to bring an action for damages. It has been accepted in Ceylon that a decree for partition cannot be set aside on the ground of fraud: *Assena Marikar* v. *Usuba Lebbe*[22] and *Nono Hami* v. *De Silva.*[23] Between the dates of those two cases, 1878 and 1891, a number of cases were litigated in which this controversy was gone into, and later in *Jayawardene* v. *Weerasekera*[24] the same view was taken—that a partition decree cannot be set aside for fraud—and that has been upheld ever since by the courts in Ceylon. The same view is also expressed in Law of Partition in Ceylon, 1904 ed., p. 65, by A. St. V. Jayewardene, and in Walter Pereira's Laws of Ceylon, 2nd ed. (1913), p. 313, and see also *Samarakoon* v. *Jayewardene.*[25]

Section 44 of the Ceylon Evidence Ordinance, 1895, in providing that a judgment may be set aside for certain reasons, including fraud, was merely putting into statutory form what was the established principle in Ceylon before the section. Yet in the face of that general principle all the courts in Ceylon in this body of authority from 1891 onwards have gone on construing the Partition Ordinance in the way they have; so that that really helps the respondents here.

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[22] (1878) 1 S.C.C. 19.

[23] 9 S.C.C. 198.

[24] 4 C.W.R. 406.

[25] 12 N.L.R. 316, 319.

It was suggested for the appellants that this is a half-way house and that because the sale did not take place it is open to the court to intervene and set aside the decree; that is a different sort of case from that considered in the courts in Ceylon. It is a quite new point. There is a case on this—*Catherinahami* v. *Babahamy*[26]—which appears to be against the respondents; it seems to say that in a partition suit the decree which is given conclusive effect is a decree after the sale and not a decree before the sale. It is contrary to *Nono Hami* v. *De Silva*[27] and a number of earlier authorities and, if necessary, it will be submitted that it is wrongly decided.

With regard to the appellants' submission that the decree should be set aside on the ground that there was no proper investigation of title, that appears to be a back-door method, so to speak, of setting aside a decree. The point may be answered, primarily, as a matter of construction of section 9. It is agreed that there ought to be a proper investigation, and the authorities in Ceylon say so, but the question is, what happens if the investigation is not as proper as the court thinks it ought to be? That is really the position in which the appellants are in this case—they say that there was not a sufficient and proper investigation here. It is submitted that there was a sufficient investigation to justify a court not to interfere. It is wholly a question of fact, and on that the judgments below amount to concurrent findings.

On the appellants' third point—whether a separate action was an appropriate procedure—it is a question whether the District Judge had jurisdiction to set aside his decree made in a quite separate proceeding, and it is submitted that he had not. As a matter of general principle, a judgment of a court of competent jurisdiction cannot be set aside in a separate action, subject to certain exceptions. *Golagoda* v. *Mohideen*,[28] *Mather* v. *Tamotharam Pillai*[29] and *Kumarihamy* v. *Weeragama*,[30] in so far as they are cases in support of the proposition that there must be a proper investigation, do not assist the appellants here in seeking

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[26] (1908) 11 N.L.R. 20.

[27] 9 S.C.C. 198.

[28] 40 N.L.R. 92.

[29] 6 N.L.R. 246.

[30] 43 N.L.R. 265.

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to set aside the decree because they are all appeal cases in partition suits. *Neelakutty* v. *Alvar*[31] was an action to set aside a decree for lack of jurisdiction. [*Edo* v. *S. L. Markar*[32] was also referred to.] The strongest case in favour of the appellants on the point of investigation of title is *Umma Sheefa* v. *Colombo Municipal Council*.[33] The respondents' whole case is that the appellants' whole remedy is the proviso to section 9—damages.

With regard to registration, the Ceylon Registration Ordinance provides that by reason of the prior registration of the appellants' deeds the unregistered will is void as against them so far as they are claiming by virtue of those deeds. On intestacy Savia Umma would have been entitled to a one-sixteenth share of all the testator's property, including the particular parcel now in question. The general principle is that a party claiming by virtue of the prior registered deed can claim only the share which that predecessor in title would have had on intestacy: *Ellapata* v. *Fernando*[34]; that clear principle is relied on as right and it should be followed. [*Fonseka* v. *Cornelis*[35] was also referred to.] Faced with that formidable difficulty, the appellants relied on *Fonseka* v. *Fernando*,[36] but if there is any conflict the later cases should be followed. In any case, *Fonseka* v. *Fernando*[36] turned upon quite different circumstances, and did not deal with a fidei commissum; it does not apply here. Reliance is placed on *Rodrigo* v. *Perera*.[37] The appellants were not entitled by virtue of prior registration of their deeds to more than the one-sixteenth share.

Lastly, the appellants say, with regard to the fifteen-sixteenths, that they are entitled to rely on prescription because the will is void. Under the Registration Ordinance the will is void only as against persons claiming by virtue of the prior registered deeds, and it is not void as against persons claiming by virtue of possession, and under the Prescription Ordinance they are claiming by virtue of possession. The appellants must prove undisturbed and uninterrupted possession for 10 years previous to the bringing of such action. They have not proved such possession for 10 years subsequent to the accrual of the respondents' title as fidei commissarii, and therefore have not acquired title by prescription. The proviso to section 3 of the Prescription Ordinance does not have the effect of shifting the burden. [Reference was made to *Chelliah* v. *Wijenathan*.[38]]

[31] (1918) 20 N.L.R. 372.
[32] (1879) 2 S.C.C. 114.
[33] 36 N.L.R. 38.
[34] 24 N.L.R. 175.
[35] 20 N.L.R. 97.
[36] 15 N.L.R. 491.
[37] (1923) 24 N.L.R. 420, 424.
[38] 54 N.L.R. 337, 342.

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[EARL JOWITT intimated that their Lordships were against the appellants on all points except prescription.]

Sir Lynn Ungoed-Thomas Q.C., in reply, referred to Jayewardene on the Law of Partition in Ceylon, 2nd ed., p. 195, to *Fernando* v. *Marsal Appu*[39] and to *Samarakoon* v. *Jayewardene*.[40]

Dec. 11. The judgment of their Lordships was delivered by LORD COHEN. The dispute between the parties relates to immovable property situate at Kollupitiya, within the Municipality and District of Colombo Western Province. Their Lordships will refer to it hereafter as "the property." The property formerly belonged to one Idroos Lebbe Marikkar (hereinafter referred to as "Marikkar"). He died in 1876, probate of his will being granted on May 29, 1876. In accordance with directions contained in the will the estate was divided amongst those who would have been Marikkar's intestate heirs in such a manner that each received the equivalent in value of what would have been his or her share upon an intestacy. In that division the property was conveyed by the surviving executor by a deed No. 2575 of September 14, 1888, to Savia Umma, a daughter of the testator. The conveyance was made subject to the conditions imposed by the will, including a provision that the said Savia Umma or her issue or heirs should not sell, mortgage or alienate the property but should hold the same in trust for "the grand-"children of my children and the grandchildren of my heirs and "heiresses" as therein mentioned.

On July 15, 1949, a partition action was started in the District Court of Colombo by seven of the present respondents against the other 36 respondents, the 43 respondents, grandchildren of Savia Umma, between them claiming to be all the persons interested in the property. To these proceedings the appellants were not made parties. In the plaint in the partition action the plaintiffs allege in paragraph 19 that the parties to the partition action and their predecessors in title had been in undisturbed and uninterrupted possession of the property. The plaintiffs asked for sale under the Partition Ordinance (No. 10 of 1863) and for division of the proceeds.

At this point it is convenient to refer to the relevant provisions of the Partition Ordinance. Section 2 provides that "When any landed property shall belong in common to two or "more owners, it is and shall be competent to one or more of "such owners to compel a partition of the said property; or,

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[39] 23 N.L.R. 370.

[40] 12 N.L.R. 316.

"should such partition be impossible or inexpedient . . . to apply "for a sale thereof, and in either case to file in any court of "competent jurisdiction a libel . . ." as therein mentioned. Section 4 gives direction as to investigation of the title of the plaintiffs (a) in the event of default of appearance by any defendant, (b) after appearance if there is a dispute as to title or if any defendant shall claim a larger share than the plaintiffs have stated to have belonged to him. The section goes on to provide that the court shall try and determine any material question in dispute between the parties and shall decree a partition or sale according to the application of the parties or as to the court shall seem fit. Sections 5, 6 and 7 deal with what is to be done in the event of a decree of partition being made. With these sections their Lordships are not concerned in the present case. Section 8 gives directions as to the carrying out of a decree for sale. Once the decree has been made no further decree is necessary, and it is provided that a certificate under the hand of the judge of the court that the property has been sold under order of the court and setting forth the name of the purchaser thereof and that the purchase money has been paid into court by him shall be evidence in any court of the purchaser's title without any deed of transfer from the former owners.

Section 9, which is the most important section requiring consideration on the present appeal, provides as follows: "The "decree for partition or sale given as hereinbefore provided shall "be good and conclusive against all persons whomsoever, what- "ever right or title they have or claim to have in the said "property, although all persons concerned are not named in any "of the said proceedings, nor the title of the owners nor of any "of them truly set forth, and shall be good and sufficient "evidence of such partition and sale and of the titles of the "parties to such shares or interests as have been thereby "awarded in severalty; Provided that nothing herein contained "shall affect the right of any party prejudiced by such partition "or sale to recover damages from the parties by whose act, "whether of commission or omission, such damages had "accrued."

Returning now to the partition action, on March 29, 1950, the District Judge made a decree in the course of which he declared the shares of the various parties to the action and ordered and decreed that the property should be sold as therein mentioned and the proceeds be brought into court to abide by the further order of the court.

It is to be noted that the present appellants had not been made parties to that action. They claim to be entitled to the whole of the property as descendants of one Adamjee Lukmanjee who had acquired the property from one Leonora Fonseka. She had acquired it under a fiscal's conveyance executed as the result of mortgage proceedings in the District Court of Colombo against the said Savia Umma and her husband. The fiscal conveyance did not set out the restrictions on Savia Umma's power to deal with the property which were contained in the 1888 conveyance under which she acquired title.

At this point their Lordships must observe that all the deeds and documents on which the appellants rely for their title were duly registered in accordance with the provisions of the Registration Ordinance, but that neither the probate of Marikkar's will nor the deed of 1888 were so registered. The appellants argued that the relevant sections of the Land Registration Ordinance gave them priority over the title of the respondents under the will and the conveyance of 1888.

The relevant section of the Registration Ordinance at the time of the execution of the conveyance to Mr. Adamjee Lukmanjee was section 17 of Ordinance No. 14 of 1891. This Ordinance was repealed by Ordinance No. 23 of 1927, and section 7 of the repealing Ordinance provided that an instrument executed or made on or after January 1, 1864, whether before or after the commencement of the repealing Ordinance, should unless it was duly registered under the Ordinance be void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which might be duly registered under the Ordinance. For reasons which will appear hereafter their Lordships do not find it necessary to deal with the argument based upon the Registration Ordinance.

From the decree of the District Judge in the partition action certain respondents appealed to the Supreme Court on the question whether they had received their proper shares under the decree of the District Judge. Before that appeal could be heard in the Supreme Court the appellants, who had become aware for the first time of the partition proceedings, petitioned on May 20, 1950, for an injunction restraining sale of the property. In paragraph 16 of their petition they pleaded that they should have been made parties to the action and should have had and should have been given notice thereof, and they asked by way of relief for an injunction restraining any sale of the property, for an order setting

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aside or vacating the decree in the partition action and for a declaration that the decree in the partition action was null and void and of no force or effect in law.

What happened on that petition does not appear clearly from the record. Their Lordships are left in doubt whether the attention of the Supreme Court at the hearing of the appeal from the partition decree was ever called to this petition for injunction and other relief. Had the attention of the Supreme Court been directed to this matter it is possible that they would have considered carefully whether there had been sufficient investigation of the respondents' title, and if there had not been sufficient investigation they might have directed a new trial under the powers referred to later in this judgment.

On May 20, 1950, the appellants also lodged their plaint in the proceedings which have now reached their Lordships' Board. In clause 14 thereof they pleaded that by themselves and through their predecessors in title they had been in the sole and uninterrupted and undisturbed possession of the property to the exclusion of all others from at least March 29, 1916, and that they had prescribed to the property. That pleading was directed to the Prescription Ordinance, No. 22 of 1871. Section 3 of that Ordinance so far as material provided as follows:—

"Proof of the undisturbed and uninterrupted possession by a "defendant in any action, or by those under whom he claims, of "lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to "say, a possession unaccompanied by payment of rent or produce, "or performance of service or duty, or by any other act by the "possessor, from which an acknowledgment of a right existing in "another person would fairly and naturally be inferred) for ten "years previous to the bringing of such action, shall entitle the "defendant to a decree in his favour with costs. And in like "manner, when any plaintiff shall bring his action . . . proof of "such undisturbed and uninterrupted possession as hereinbefore "explained, by such plaintiff . . . or by those under whom he "claims, shall entitle such plaintiff . . . to a decree in his favour "with costs.

"Provided that the said period of ten years shall only begin "to run against parties claiming estates in remainder or reversion "from the time when the parties so claiming acquired a right of "possession to the property in dispute."

Returning now to the plaint, the relief claimed by the appellants was, so far as relevant, as follows: (a) An order that the

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court do set aside or vacate the decree in the partition proceedings; (b) a declaration that the said decree was null and void and of no force or effect in law, and in the alternative; (c) damages in the sum of Rs.100,000. Answers were put in by some of the defendants and issues were settled. In due course the action came on for trial before District Judge L. B. de Silva. He answered the various issues, his findings so far as material to the present appeal were as follows: (1) the respondents had acted wrongly, unlawfully, fraudulently and collusively in failing to make the appellants party to the partition action or in failing to give them any notice thereof; (2) the value of the property at the date of the action was Rs.100,000; (3) the appellants had not acquired a prescriptive title to the premises since they had not discharged the onus, which the District Judge held rested on them, of establishing when the respondents' right to possession as fidei commissarii accrued to them; therefore (4) the appellants could only claim such rights as accrued to them by virtue of the priority conferred on them by the Registration Ordinance.

He held further that the effect of that Ordinance was that the will being void, Savia Umma could only have vested in Leonora Fonseka and through her in the appellants' predecessors in title such interests as she had in the property on an intestacy, and that such interest was only 1/16th of the value of the property, i.e., Rs.6,250. He added, however, the value of the improvements which he found the appellants and their predecessors in title to have effected on the property and, accordingly, awarded to the appellants by way of damages under the proviso to section 9 of the Partition Ordinance the sum of Rs.29,687/50. He rejected their claim to set aside the decree or to have it declared null and void on the ground that the effect of section 9 of the Partition Ordinance was that the decree was final and binding and that the only remedy of any person, including a person who had been defrauded by the action of the parties who obtained the decree, was limited to a claim in damages.

The plaintiffs appealed to the Supreme Court, who affirmed the decision of the District Judge, and it is from that decision that the appellants, with the leave of the Supreme Court, now appeal to their Lordships.

Having regard to the finding of the trial judge as to the fraud and collusion issue and the confirmation of that finding by the Supreme Court, it is plain that the appellants were entitled to some relief, and the questions for their Lordships' decision are: (1) Whether the appellants can now insist on having the decree in

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the partition action set aside or are limited by section 9 of the Partition Ordinance to their claim for damages; and (2) whether, if they are so limited, they must accept the figure of Rs.29,687/50 awarded to them by the trial judge or are entitled to receive Rs.100,000, which the parties agree would be the correct figure if the appellants were entitled absolutely to the property at the date of commencement of the proceedings.

The appellants support their claim to have the decree set aside on two grounds. First, they say that, notwithstanding the wide language of section 9, fraud is something outside the ambit of that section, and that on general principles a decree obtained by fraud is both under English law and under the law of Ceylon always liable to be set aside in independent proceedings. Their Lordships heard an interesting argument on this point from Sir Lynn Ungoed-Thomas on behalf of the appellants, and despite the wide language of the Ordinance they might have been persuaded to accept it had there not been a long succession of authority in the courts of Ceylon establishing the principle, for which justification can be found in the language of the section, that " a partition decree is conclusive against all persons whomsoever, " and that a person owning an interest in the land partitioned " whose title even by fraudulent collusion between the parties " had been concealed from the court in the partition proceedings " is not entitled on that ground to have the decree set aside, his " only remedy being an action for damages." The citation which their Lordships have made was from the decision of Sir Alexander Wood Renton C.J. in *Jayawardene* v. *Weerasekera.*[1] That decision followed on a continuous series of decisions dating back as far as 1891, see *Nono Hami* v. *De Silva.*[2] Prior to that year there had been some conflict of decision, but in the case last cited Burnside C.J. said[3] that section 9 " makes a partition decree " obtained under the Partition Act final and conclusive in all " respects, save as to the right contained in the proviso of any " party prejudiced by it to his action for damages." He went on[4]: " It was urged that it was a principle of law that fraud " vitiated everything obtained by it. That is too general a " proposition. It is true that the law abhors fraud, and equity " had an undoubted jurisdiction to relieve against every species " of fraud; yet when adequate relief can be had at law, where in " fact there is a full, perfect, and complete remedy otherwise, it

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[1] (1917) 4 C.W.R. 406, 407.

[2] (1891) 9 S.C.C. 198.

[3] Ibid. 199.

[4] Ibid.

"is not the course to interfere. (*Deere* v. *Guest*,[5] and *per* Lord "Hardwicke, Smith's Manual of Equity, p. 51.) Now, looking "at the very distinct declaration contained in the 9th section, "and to what must have been the object which the legislature "had in view, I can come to no other conclusion than that the "proviso was meant to conserve the only remedy, except by "way of appeal, which could be sought against a decree already "pronounced, namely, one which sounded in damages; if it were "not so, the operation of the Ordinance must be disastrous. No "single decree could escape a litigious spirit to reopen it on the "ground of fraud, and no date would exclude such contests. The "object of the Partition Act was to quiet the title to land, and "leave persons prejudicially affected by any such decree, by "reason of any cause whatever, to their remedy in damages at "law, and this to my mind is a full and perfect remedy, and "it is unfortunate if any mere dicta should have led to any "uncertainty on the point."

Since that date there has been no decision conflicting with the principle laid down as stated by Sir Alexander Wood Renton in the passage already cited, and their Lordships, whatever their view might otherwise have been as to the correctness of the decision, would not be prepared to disturb a principle so long recognized and on the basis of which many titles may have been established.

Since Sir Alexander Wood Renton gave his judgment in 1917 there has been no decision to the contrary. Sir Lynn referred to a dictum of Ennis J. in *Fernando* v. *Marsal Appu*,[6] in which the learned judge said that he did not consider it necessary to go into the question of whether in exceptional circumstances, where the property is still in the sole possession of the parties whose fraud is set up, the court could not on proof of fraud take away the property from them. Sir Lynn said that the present was such a case and that it was still open to their Lordships to say that as the decree for sale had not actually been carried out and as the fraud had been proved they could take away the property from the respondents. Their Lordships' attention was not called to any case where the possible exception suggested in the passage stated had been recognized. Bearing in mind that section 9 expressly provides for the binding nature, not of the sale but of the decree for sale, and that section 8 does not contemplate any decree subsequent to that decreeing that sale should take place, their Lordships do not think it right to recognize the alleged exception to the general rule.

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[5] (1836) 1 M. & C. 516.

[6] (1922) 23 N.L.R. 370.

Alternatively the appellants submitted that there had been no proper investigation of title in the present case and that consequently the decree was not a decree within the terms of section 9 of the Partition Ordinance. The Supreme Court have laid it down that it is the duty of the court before entering a decree to satisfy itself that the parties to the case have title to the land. The District Judge in the present case referred to a decision of the full bench, *Mather* v. *Tamotharam Pillai*,[7] where it was held that a paramount duty is cast upon the court by the Partition Ordinance to ascertain who are the actual owners of the land sought to be partitioned before entering up a decree which is good and conclusive against the world. Layard C.J. went on to say [8]: "As collusion between parties to a partition action is always "possible, and as in such a suit the parties get their title from "the decree of the court awarding them a definite piece of land, "and as a decree for partition under section 9 of the Ordinance "is good and conclusive against all persons whomsoever, what"ever their rights may be, whether they are parties to the suit "or not, it appears to me that no loophole should be allowed to a "judge by which he can avoid performing the duty cast expressly "upon him by the Ordinance." Their Lordships find themselves in complete agreement with what was said by Layard C.J. in that case. The facts of each case will indicate the manner in which the judge can best carry out his duty, and their Lordships would not attempt to lay down a complete course of procedure for the trial judges to follow in every case. Their Lordships think, however, that the following matters should be attended to in the generality of cases.

The trial judge should insist upon the production of the relevant extracts from the registers kept under the Land Registration Ordinance (Chapter 101). They may reveal registered instruments suggesting the possible existence of title in persons other than the parties before the court. The names of all such persons should be ascertained by due investigation and they should be given notice of the proceedings. Whether they appear in court or not, the effect of such instruments upon the title set up by the parties before the court should be examined. The trial judge should also investigate in sufficient detail the question of possession. He should have before him sworn testimony

[7] (1903) 6 N.L.R. 246.

[8] Ibid. 250.

specifying by name the persons actually in possession and satisfy himself that they are some or all of the parties before the court or that they are in possession under some or all of such parties. He should in case of doubt cause the parties in possession to be summoned for the purposes of his investigation. He should also ask for the production of the originals or duplicates of receipts for rates and reconcile the material furnished by the receipts with the evidence given. The fraud which has been established in the partition action under consideration could not have taken place if the steps indicated by their Lordships had been taken.

It is to be observed, however, that Layard C.J. did not go on to say what would be the effect if a decree was made and was either not appealed from or was confirmed on appeal. Their Lordships do not think it permissible for a court in a subsequent action to disregard the decree merely because they come to a different conclusion from that of the trial judge as to what were the appropriate steps to take in the particular case in the investigation of the title. The decree which is " good and conclusive " against all persons whomsoever " under section 9 is a " decree " for partition or sale given as hereinbefore provided." Their Lordships are of opinion that the words " as hereinbefore provided " have reference to section 4, which requires the court to investigate title. Once it appears that the court has done so, then any defect in the method of investigation would not vitiate the decree any more than an error of law or of fact by a judge would in the generality of cases vitiate a decree duly entered and not appealed from or confirmed on appeal. It has been held by the Supreme Court of Ceylon that a decree entered without any investigation of title has not the conclusive effect provided by section 9. Thus, *Gooneratne* v. *Bishop of Colombo* [9] was decided on the basis that there was nothing to show " that the judge " made any inquiries into title " and that " the decree was passed " on the defendants' admission." It was held that the decree for sale had not a conclusive effect under section 9 of the Ordinance. The basis of the decision in *Umma Sheefa* v. *Colombo Municipal Council*,[10] which was strongly relied upon by the appellants, was that " in the result, apart from the consent of parties, " there was no evidence that the parties to the action or any of " them were co-owners of the premises," so that it could not have been said that there had been any investigation of title. It was held that the decree for sale did not have a conclusive effect.

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[9] (1931) 32 N.L.R. 337.

[10] (1934) 36 N.L.R. 38.

With these decisions their Lordships agree, but they have no application to the present case. In the partition case under consideration the District Judge did hold an investigation into title, although his investigation has not been sufficiently exhaustive to prevent the perpetration of the fraud which has taken place.

What their Lordships have said in the preceding paragraph is applicable when it is sought by separate action to set aside a decree in a partition action or in a separate action to challenge the conclusive effect of a partition decree. On an appeal in a partition action, if it appears to the Court of Appeal that the investigation has been defective it should set aside the decree and make an order for proper investigation. Nothing in the partition action can be final or conclusive until the appeal is concluded. But the fact that lack of proper investigation may be sufficient for an appeal court acting in the same case to set aside a decree does not detract from the conclusive effect of section 9 when the decree is being considered in a separate case. Their Lordships would add that if it appears to the Supreme Court, when hearing an appeal in a partition case, that investigation of title has been inadequate it should, even though no party before it has raised the point, set aside the decree acting under its powers of revision.

For the reasons their Lordships have given they are unable to accept the submission on behalf of the appellants that the partition decree should be set aside.

They turn, therefore, to the question of damages. The appellants based their claim to the Rs.100,000 on two grounds. First they said that they had acquired title by prescription and for that reason alone must be entitled to recover the Rs.100,000 as being the value of the property as a whole at the material date. Alternatively they pleaded that they had a valid title by reason of the provisions of the Registration Ordinance, to which their Lordships have already referred. Their Lordships do not find it necessary to go into the question raised under the Registration Ordinance, since they are satisfied that under the Prescription Ordinance the appellants have acquired a good title to the property for the value of which they now ask to be compensated. It was common ground between the parties that the onus of proving the 10 years undisturbed and uninterrupted possession adverse to or independent of the title of the respondents rested in the first instance on the appellants. But it was said on behalf of the respondents that once they had established that they had an interest as fidei commissarii under the last will of Marikkar the onus of proving the date on which their right to possession accrued to the respondents rested on the appellants. As the trial judge put it: "Once the defendants established that they are fidei commissarii it is for the plaintiffs to establish that as against them "qua fidei commissarii plaintiffs have acquired a title by prescription. To do so, the plaintiffs must prove under the proviso to "section 3 of the Prescription Ordinance that they have acquired "a title by prescription subsequent to the accrual of the rights of "the defendants as fidei commissarii."

Their Lordships are unable to agree with the courts in Ceylon on this point. Looking at the matter first as a question of construction, they think that once parties relying on prescription have brought themselves within the body of section 3 the onus rests on anyone relying upon the proviso to establish their claim to an estate in remainder or reversion at some relevant date, and they cannot discharge this onus unless they establish that their right fell into possession at some time within the period of 10 years. The view which their Lordships have reached as a matter of construction seems strongly supported by the provision of section 106 of the Ceylon Evidence Ordinance, No. 14 of 1895 (c. 11 of the Legislative Enactments of Ceylon, 1938 Rev.), which reads: "When any fact is especially within the knowledge "of any person, the burden of proving that fact is upon him." In the case under consideration knowledge of the dates of the deaths of Savia Umma and her children would be especially within the knowledge of the respondents and the dates might well be unascertainable by the appellants.

It was suggested that the opinion which their Lordships have reached on the construction of the section with the assistance of the Evidence Ordinance is in conflict with the decision of the Supreme Court under section 13 of the Prescription Ordinance in *Chelliah* v. *Wijenathan.*[11] This section modifies the operation of section 3 of the Prescription Ordinance in the case of disabilities referred to in the section, namely, infancy, idiocy, unsoundness of mind, lunacy, or absence beyond the seas. In that case Gratiaen J. said[12]: "Where a party invokes the "provisions of section 3 of the Prescription Ordinance in order "to defeat the ownership of an adverse claimant to immovable "property, the burden of proof rests fairly and squarely on him

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[11] (1951) 54 N.L.R. 337.

[12] Ibid. 342.

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"to establish a starting point for his or her acquisition of "prescriptive rights. If that onus has prima facie been discharged, the burden shifts to the opposite party to establish "that, by reason of some disability recognized by section 13, "prescription did not in fact run from the date on which the "adverse possession first commenced. Once that has been "established, the onus shifts once again to the other side to "show that the disability had ceased on some subsequent date "and that the adverse possession relied on had uninterruptedly "continued thereafter for a period of 10 years."

The language of section 13 is so different from that of the proviso to section 3 that their Lordships would not be prepared to hold that even if the decision in the case cited were correct it was applicable to the very different language used in the proviso to section 9. They are not prepared in giving their decision in the present case to overrule the decision in *Chelliah's* case,[13] but they desire to point out that so far as can be gathered from the judgments in that case, the attention of the Supreme Court was not directed to section 106 of the Evidence Ordinance. Should a similar case ever come before this Board they would like the assistance of observations of the Supreme Court as to the application of that section. They stress this point because the knowledge, e.g., of duration of absence beyond the seas, must as a rule be within the cognizance of the party relying on such absence, and it might well be impossible for the opposite party to ascertain when the absence ceased.

For the reasons their Lordships have given they will humbly advise Her Majesty to allow the appeal and increase the damages awarded to Rs.100,000. The respondents must pay the appellants' costs of this appeal as well as their costs of the appeal to the Supreme Court. The order of the District Court as to costs will stand.

Solicitors: *Farrer & Co.; T. L. Wilson & Co.*

C. C.

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[13] 54 N.L.R. 337.

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COLOMBO APOTHECARIES' CO. LTD. . APPELLANT;
AND
MARTHA AGNES PEIRIS AND OTHERS . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Land—Registration—Priorities—Unregistered deed of gift—Subject to fidei commissum—Subsequent registered deed of transfer by fiduciary for valuable consideration—Transfer effected before fiduciary had acquired title—Deed of gift still unregistered when fiduciary acquired title—Claim by subsequent fiduciaries to be co-owners of property and for partition—Priority of registered over unregistered deed—Land Registration Ordinance, No. 8 *of* 1863, *ss.* 38, 39.

Section 38 of the Land Registration Ordinance, 1863, of Ceylon, provided, inter alia, that every deed of transfer of land or other immovable property should be registered, and by section 39: "Every "deed . . . as aforesaid, unless so registered, shall be deemed void "as against all parties claiming an adverse interest thereto on "valuable consideration, by virtue of any subsequent deed . . . "which shall have been duly registered . . ." (The above sections were re-enacted as sections 16 and 17 of the Land Registration Ordinance, 1891.)

The original owner of the suit premises in Colombo by an unregistered deed gifted them in 1870 to his son—his only issue—reserving a life interest to himself and creating a fidei commissum in favour of his son's descendants, which, as the deed was executed in 1870, was effective for four generations. The donor died in 1873 intestate, and his son died intestate in 1899 leaving a son L. and a daughter M. In 1895 the son L., who, since his father was then still alive, had no title or interest in the premises, purported to transfer by registered deed the whole of the premises to a person whose interest, if any, was admittedly subsequently acquired by the appellant in 1926. L. and M. having each died intestate in 1939 and 1934 respectively, the first respondent, who was one of the two daughters of L., in 1947 claimed as against the appellant that she, her sister and the four children of M. were entitled to the property as co-owners and asked for a sale under the Partition Ordinance, 1863:—

Held, that as the deed of 1870 remained unregistered at the time of the acquisition of title by L. on his father's death, the duly registered deed of 1895, though it was registered at a time when it passed no interest, became on the death of L.'s father a duly registered instrument passing title which prevailed over the unregistered deed and was sufficient to defeat its provisions. Accordingly, the appellant became entitled to the undivided half share of the premises claimed by the two daughters of L. Further, inasmuch as the appellant had been in continuous and undisputed possession of the entire premises for 26 years, he had acquired a prescriptive title to the half share of the four children of M. who had claimed that half share as fiduciaries under the deed of 1870 on the death of M. The appellant was therefore entitled to the entirety of the premises, and the respondent's action must be dismissed.

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* *Present*: EARL JOWITT, LORD OAKSEY, LORD COHEN, LORD KEITH OF AVONHOLM and MR. L. M. D. DE SILVA.

The description of instruments contained in section 38 of the Land Registration Ordinance is wide and sufficient to cover instruments which, though they are ineffective at the time of execution, may become effective at a later date.

Judgment of the Supreme Court of Ceylon reversed.

APPEAL (No. 25 of 1955) from a judgment and order of the Supreme Court of Ceylon (April 8, 1954) reversing a judgment and order of the District Court of Colombo (October 25, 1950).

The following facts are taken substantially from the judgment of the Judicial Committee: The plaintiff in this case (a respondent to this appeal) instituted the action in the District Court of Colombo for a sale under the Partition Ordinance (Chapter 56, Legislative Enactments of Ceylon, 1938) of certain premises, No. 125, Glennie Street, Slave Island, Colombo. She pleaded that she and the first five defendants (also respondents to this appeal) were entitled to the property as co-owners. She further pleaded that the sixth defendant (the present appellant) had no right to the premises and was in wrongful possession thereof.

The District Judge (V. Manickarasagar A.D.J.) held that the respondents had no title to the land and dismissed the action. On appeal the Supreme Court (Gratiaen and Gunasekara JJ.) held that the plaintiff-respondent and the first defendant-respondent had certain fiduciary rights to the land under a deed of gift of 1870 creating a fidei commissum, and that the second to the fifth defendants-respondents also had had certain rights which they had lost owing to prescriptive possession by the appellant. The Supreme Court entered decree accordingly.

The appellant now asked that the decree of the District Court dismissing the action be restored

It was common ground that one Solomon Rodrigo was originally the owner of the premises. His sole issue was his son Lorenzo Rodrigo. In 1870 by an unregistered deed No. 8,550 (referred to in the proceedings as P1) Solomon gifted the premises to Lorenzo, reserving a life interest to himself and creating a fidei commissum in favour of Lorenzo's descendants, which, as the deed was executed in 1870, was effective for four generations. Solomon died intestate in 1873. Lorenzo died intestate in 1899 leaving issue a daughter Madalena and a son Lawrenti. Madalena died in 1934 intestate and leaving as issue the second to the fifth defendants-respondents. Lawrenti died in 1939 intestate and leaving as issue the plaintiff-respondent and the first defendant-respondent. Lawrenti on December 21, 1895, when his father Lorenzo was still alive, by a registered deed No. 5249 (referred to in the proceedings as 6D1) transferred the whole of the premises to one Dias. It was not disputed that the interest, if any, in the premises which passed to Dias on 6D1 either at the time of execution of 6D1, or at any time thereafter, had, upon a series of instruments, passed to the appellant.

The main question in this appeal was whether in the circumstances the deed of sale 6D1 took priority over the deed of gift P1 by virtue of prior registration.

1956. Nov. 1, 5, 6. *Raymond Walton*, *Eric Amerasinghe* and *L. Kadirgamar* for the appellant. The dispute is as to the title to land arising out of a partition action commenced by the first respondent as plaintiff to which all other parties, including the appellant company, were defendants. The original deed of gift of 1870, which created the fidei commissum, was never in fact registered in accordance with the Land Registration Ordinance, 1863, and is void as against a person claiming an interest under a subsequent registered deed. The contest is between the children as the fidei commissary heirs and the appellant company which claimed as to one-half of the property as a purchaser from Lawrenti and as to the other half either as purchaser from Madalena—in each case through a series of documents all registered—or, alternatively, claimed to shut out the descendants of Madalena as having prescribed to their interests by virtue of over 10 years' possession. The appellant company, searching the register, would find nothing adverse to the title which it claimed. It is entitled to assume that the property passed on intestacies in respect of both halves, and its title, being registered, prevails over the unregistered deed of gift; the latter deed never having been registered, no title accruing thereunder can prevail against the title of the appellant as a bona fide purchaser for value tracing its title through a series of registered deeds. The plaintiff claims under the unregistered deed of gift which, she says, is in some way binding on the appellant, and she says that she and her sister are entitled between them to one-half of the property under the fidei commissum.

The appellant is content with the judgment of the District Court. The Supreme Court were wrong in saying that the deed of gift, P1, prevailed over the deed of 1895, 6D1. The appellant's case is that it can ignore P1. The first proposition is that a conveyance by an heir ab intestato which is registered under the provisions of the Land Registration Ordinance prevails over a prior unregistered deed from the same source. Secondly, that doctrine is not affected by the fact that the registered deed was executed before the title accrued to the grantor if the competing deed was unregistered at the date when the title devolved upon him. It is conceded that there is no direct authority in point, but it is submitted that there could have been no possibility of doubting the priority of the appellant's title if Lawrenti had executed the deed after, and not before, his father's death; and the whole point of the doctrine of feeding the estoppel is to eliminate the necessity for a subsequent deed of that nature. With regard to Roman-Dutch law and the English doctrine of feeding the estoppel, *Fernando* v. *Gunatillaka*[1] shows that a rather wider doctrine prevails in Ceylon, and accordingly the moment it became possible for Lawrenti to pass title, be it a notional title derived ab intestato, his deed thereafter was of full force, vigour and effect, and prevailed over the unregistered deed of gift.

In an earlier action, No. 11,739 in the District Court of Colombo, in which Lorenzo sued Dias for a declaration of title to the premises now in question, the Supreme Court, affirming the decision of the District Court, decided that P1 prevailed over 6D1, and in the present case the Supreme Court held that that earlier decision operated as res judicata against the present appellant, who is the successor in title to the unsuccessful party in those earlier proceedings. The statutory provision in Ceylon relating to the doctrine of res judicata is section 207 of the Civil Procedure Code, c. 86 of the Legislative Enactments of Ceylon, 1938 revision, and *Velasipillai* v. *Kanapathipillai*[2] decided that there is really no distinction between English, Indian and Cingalese principles. The law on res judicata is accurately put in a nutshell by A. L. Smith L.J. in *Ballantyne* v. *Mackinnon*[3]; and see Spencer Bower on Res Judicata (1924), p. 119, and *Kennedy* v. *Kennedy*,[4] which in some respects bears a quite marked similarity to the facts of the case alleged here to give rise to an estoppel. The point in suit No. 11,739 was whether or not Lorenzo was entitled to possession as against Dias, and the question as to what Dias may have received on 6D1 from Lawrenti by reason of inheritance by Lawrenti from Lorenzo was expressly left open by the Supreme Court. For the position where a point has been expressly left open, see *Patchett* v. *Sterling Engineering Co. Ltd.*[5] The judgment and decree in case No. 11,739, therefore, could not and did not create any estoppel binding on the appellant on the question of title now raised in this case for the first time.

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[1] [1921] 2 A.C. 357, 366, 373.
[2] (1941) 42 N.L.R. 522, 524.
[3] [1896] 2 Q.B. 455, 462.
[4] [1914] A.C. 215, 220.

If the above submission on res judicata be wrong, and if the judgment and decree in suit No. 11,739 did have the effect of deciding that the unregistered document prevailed over registered documents, then that decree ought to have been registered and it was not: Land Registration Ordinance, 1863, ss. 38, 39. Admittedly, *Mohamad Ali* v. *Weerasuriya*[6] is a direct authority to the contrary. The appellant had acquired an absolute title to the entirety of the property in suit.

Ralph Millner and *J. Bisschop* for the first respondent. With regard, first, to the effect of what occurred at the time of the conveyance by Lawrenti to Dias, it is submitted that the registration of the deed 6D1 is not effective to give that deed priority over the deed of gift by Solomon, because at the date of the registration the vendor, Lawrenti, had no title, and because the purchaser, Dias, at the date of registration had no title to register. Secondly, in light of the dates, the instrument 6D1 at the time when it was registered or at any time since did not fall within the definition of an "instrument" affecting land in the Registration Ordinance so as to be entitled to priority over unregistered documents: Land Registration Ordinance, ss. 3, 6, 7 and 38. A correct statement of the law on this branch of registration is made in *Gunatilleke* v. *Fernando.*[7] The report of *Kadirevelu Pulle* v. *Pina*[8] does not set out the actual terms of the conveyance, and cannot be relied on one way or the other for any proposition where the background is relevant, but it is certainly not against the respondents here.

With regard to the res judicata point, the appellant is estopped by the judgment and decree in suit No. 11,739 from asserting against the respondents that the property is free from the fidei commissum under which the respondents are beneficiaries. It is estoppel by record rather than res judicata; it is a principle well recognized and of fundamental importance, and it cannot be said that a Registration Ordinance abrogates it. The estoppel prevented the appellant from saying at any stage that the respondents were not entitled to their rights under the fidei commissum.

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[5] (1953) 71 R.P.C. 61, 73.

[6] (1914) 17 N.L.R. 417.

[7] (1919) 21 N.L.R. 257, 267.

[8] (1899) 9 S.C.C. 36.

[A reply was not required.]

Dec. 11. The judgment of their Lordships was delivered by MR. L. M. D. DE SILVA, who stated the facts set out above, and continued: It is convenient before dealing with the rest of the case to examine what interest, if any, the appellant acquired on the series of instruments. At the time 6D1 was executed Lawrenti had no title to the whole of the premises which he purported to convey or to any interest at all therein because his father Lorenzo was still alive. The deed 6D1 was registered on December 31, 1895. The deed of gift No. 8,550 (P1) was not registered at the time and was in fact unregistered at the date of action. Sections 38 and 39 of the Land Registration Ordinance, No. 8 of 1863 (re-enacted as sections 16 and 17 of the Land Registration Ordinance, 14 of 1891), are to the following effect:—

38. "From and after the time when this Ordinance shall "come into operation, every deed or other instrument of sale "purchase, transfer, assignment or mortgage, of any land or "other immovable property, or of promise, bargain, contract or "agreement, for effecting any such object, or for establishing or "transferring any security, interest or encumbrance affecting "such land or property (other than a lease at will or for any "period not exceeding one month), or of contract or agreement "for the future sale or purchase or transfer of any such land or "property; and every deed or act of release, surrender or annul-"ment, of or affecting any such deed or other instrument, and "the probate of any will, and every grant of administration "affecting any such land or property and every judgment or "order of court affecting any such land or property shall, if "executed, made, granted or pronounced after the time when this "Ordinance shall have come into operation, be registered in the "branch office of the District or Province in which such land "or . . . property is situate. . . ."

39. "Every deed, judgment, order or other instrument as "aforesaid, unless so registered, shall be deemed void as against "all parties claiming an adverse interest thereto on valuable "consideration, by virtue of any subsequent deed, judgment, "order or other instrument, which shall have been duly registered "as aforesaid. Provided however that fraud or collusion in

"obtaining such last mentioned deed, judgment, order or other "instrument, or in securing such prior registration, shall defeat "the priority of the person claiming thereunder, and that nothing "herein contained shall be deemed to give any greater effect or "different construction to any deed, judgment, order or other "instrument registered in pursuance hereof, save the priority "hereby conferred on it."

Parties are agreed (subject to the possibility of the intervention of another principle of law discussed later) that, according to the law of Ceylon, had Lorenzo been dead at the times of execution and registration of 6D1, the deed, by reason of registration, would have passed from Lawrenti to Dias such interest as Lawrenti would have had if both his father Lorenzo and grandfather Solomon had died intestate and the grandfather had not executed deed No. 8,550. The registration of 6D1 would have wiped out the provisions of deed No. 8,550. It is also not disputed that under the law of Ceylon by reason of the application of the doctrine exceptio rei venditae any interest which Lawrenti would have inherited from Lorenzo after the execution of 6D1 would pass on 6D1 to the transferee although at the time of execution of 6D1 Lawrenti had had no interest. The question which arises is whether the registration of 6D1 at a time when it passed no interest is sufficient to enable the transferee to defeat the provisions of deed No. 8,550. It is not disputed that if 6D1 had been registered after the death of Lorenzo (instead of being registered before the death) it would have defeated deed No. 8,550. Upon this point the learned District Judge, in an able and careful judgment, said: "What I wish to emphasize is, "that the same instrument though executed at a time when the "grantor had no title, is made use of to complete the title of "the grantee; cannot then, this same instrument, though it had "been duly registered before the grantor acquired his title, be "made use of to give priority by registration over an earlier "deed, which is not registered at all or registered subsequent to "the acquisition of such title? My answer to this is in the "affirmative.

"If the subsequent instrument can be made use of to give "title, why cannot the registration of the same instrument confer "priority, provided all the other requirements to confer such "priority are present: the subsequent acquisition of title would "not only give the benefit of such title to the instrument already "executed, but would also in my opinion give the grantee the "benefit of priority by the registration of that instrument; the

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"position can however be different if the competing deed had "been registered before the subsequent acquisition of title; but "if the competing instrument remained unregistered at the time "of the acquisition of title, then, I do think that the subsequent, "but duly registered, instrument prevails over the unregistered "deed."

Their Lordships agree. It was argued that as at the time 6D1 was registered it did not pass any interest it was not an instrument coming within the range of the documents described in section 38, and that, in consequence, the registration was ineffective at the time it was made and remained ineffective ever after. Their Lordships cannot accept this argument, as the description of instruments contained in section 38 is wide, and sufficient to cover instruments which though they are ineffective at the time of execution may become effective at a later date. Moreover, 6D1 remained on the register from the time it was registered and was on the register at the point of time of, and after, Lorenzo's death. Their Lordships are of opinion that the character of being a registered instrument at that point of time is not avoided or diminished by reason of the fact that it had been on the register before then.

Both sides referred to the Ordinances mentioned above in the course of argument, and it was not suggested that the Registration Ordinance, 1927, made any difference to the conclusions drawn.

On appeal, the Supreme Court did not consider the matters discussed in the preceding paragraph because it thought that the intervention of another principle of law made them irrelevant. It took the view: "The main argument addressed to us on "behalf of the 6th defendant was that Lawrenti's purported "conveyance 6D1 of 1895 was entitled to prevail over the earlier "deed P1 by virtue of prior registration. On this point, the "learned judge held in favour of the 6th defendant. In my "opinion, however, the issue of prior registration has no application to the facts of this case. An earlier decree P6 of the "District Court of Colombo, which was upheld by this court on "appeal, decided that P1 prevailed over 6D1, and this decision "operates as res adjudicata against the 6th defendant who is "the successor-in-title of the unsuccessful party in those "proceedings."

The decree referred to was the decree in case No. 11,739 of the District Court of Colombo. In that case Lorenzo sued Dias, the transferee on 6D1, for a declaration of title to and ejectment from the premises in question. The original of deed No. 8,550 was unobtainable for the purposes of case 11,739 and Dias raised the defence that by that deed Solomon had gifted the premises directly to his grandson Lawrenti subject to an interest in Lorenzo which had expired. On secondary evidence the contents of deed 8,550 were established to be what now appears in the document P1, which, as stated earlier, is a conveyance by Solomon to Lorenzo reserving a life interest in Solomon and creating a fidei commissum in favour of Lorenzo's descendants. Lorenzo would have been entitled to succeed when it became clear that deed 8,550 conveyed nothing directly to Lawrenti as contended by Dias. There was, however, a finding that deed 8,550 contained a fidei commissum and this finding, though correct, was purely incidental. Upon appeal the decision that Lorenzo was entitled to a declaration of title and possession was affirmed, but a finding by the District Court (unnecessary for Lorenzo's success) that the deed of transfer 6D1 from Lawrenti to Dias was null and void was deleted. The deed was restored to its "pristine "condition" and, Lorenzo having died during the pendency of the appeal, the question as to what Dias may have received on 6D1 from Lawrenti by reason of "inheritance" by Lawrenti from Lorenzo was expressly left open by the Supreme Court. This is the very question discussed in previous paragraphs. As it was expressly left open nothing that happened in case No. 11,739 could have given rise to a plea of res judicata upon it.

In the present case the Supreme Court on the question of res judicata said: "The effect and true meaning of P1 was "prominently raised in issue between the parties to those pro- "ceedings. The basis of the decree against Dias in favour of "Lorenzo was (1) that P1 created a valid fidei commissum in "favour of Lorenzo and his 'descendants' and (2) that Lawrenti "had, at the time when 6D1 was executed during his father's "lifetime, only a contingent fidei commissary interest in the "property. It follows that the 6th defendant, as the successor- "in-title of the purchaser under 6D1, is bound by the decision "that P1 prevailed over 6D1."

It is true that in case No. 11,739 P1 prevailed and 6D1 did not prevail. The question in controversy there was whether, as stated by the defendant (in that case), P1 conveyed an interest directly to Lawrenti or whether it did not. When P1 was reconstructed on secondary evidence it was clear that P1 conveyed no such direct interest and consequently 6D1 (in which the transferor was Lawrenti) became totally ineffective during the lifetime of Lorenzo. It was no doubt held that P1 created a fidei commissum. That fact is not, and has never been, denied by the appellant in the present case, and the decision that P1 created a fidei commissum is not material to the considerations in the present case. The question whether it created a fidei commissum is not, and has never been, in controversy in this case. What is in controversy is whether, in the completely altered circumstances prevailing on the death of Lorenzo, 6D1 could be said to be a duly registered instrument passing title. The questions involved in this controversy did not arise (and, indeed, could not have arisen) in case No. 11,739. All that can be said of the decision in case No. 11,739 is that it fixed Dias with notice of the fidei commissum, but this fact appears to be immaterial for the purpose of their Lordships' decision. It was said for the appellant that under the law of Ceylon notice of a prior deed does not alter the effect of the registration of a subsequent deed. This view has not been challenged and it follows that there is nothing in the decision in case No. 11,739 which detracts from the normal consequences of the registration of 6D1 discussed in previous paragraphs. Upon the series of instruments referred to in those paragraphs the appellant became entitled to an undivided half share of the premises.

The 2nd to the 5th defendants-respondents claimed the remaining half share of the premises as fiduciaries under the deed of gift P1 on the death of Madalena in 1934. The District Judge held that the appellant, who had been in possession for 26 years, had prescribed to the interests of these respondents. This finding was not disturbed by the Supreme Court and has not been challenged on this appeal.

It follows from what has been said that the plaintiff-respondent has no interest in the premises in respect of which she brought this action. Her action must therefore be dismissed.

Their Lordships will humbly advise Her Majesty that the appeal be allowed, that the decree of the Supreme Court be set aside and that the decree of the District Court be restored. The plaintiff-respondent, who was the only appellant to the Supreme Court and who was the only respondent represented on this appeal, must pay the costs of this appeal and the costs of the appeal to the Supreme Court.

Solicitors: *Farrer & Co.; T. L. Wilson & Co.*

C. C.

J. C.*

1956
Dec. 4.
1957
Jan. 15.

LAILA JHINA MAWJI AND ANOTHER . . APPELLANTS;

AND

THE QUEEN . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Eastern Africa — Tanganyika — Criminal law — Conspiracy — Husband and wife—Shia Mohammedans—English rule of unity of spouses applicable in Tanganyika—Rule applicable where valid marriage potentially polygamous — Penal Code of Tanganyika (*Laws of Tanganyika*, 1947 *Rev.*, *c.* 16), *ss.* 4, 110 (*a*).

Husband and Wife—Criminal law. Criminal law—Conspiracy.

By section 110 of the Penal Code of Tanganyika: "Any person "commits a misdemeanour who—(*a*) conspires with any other "person to . . . obstruct . . . the course of justice."

By section 4: "This Code shall be interpreted in accordance "with the principles of legal interpretation obtaining in England, "and expressions used in it shall be presumed . . . except as may "be otherwise expressly provided, to be used with the meaning "attaching to them in English criminal law and shall be construed "in accordance therewith."

The rule of English criminal law that husband and wife cannot be guilty of conspiracy is incorporated into section 110 (*a*) of the Tanganyika Penal Code by section 4 of the Code, and it applies to any husband and wife of a marriage—monogamous or potentially polygamous—valid under Tanganyika law. Accordingly, the convictions of the appellants, who were lawfully married in accordance with the rules of the Khoja Sect, a sub-sect of the Shia Mohammedans—a marriage recognized as fully valid in Tanganyika—of conspiracy to obstruct the course of justice contrary to section 110 (*a*) of the Penal Code were bad and were quashed.

Judgment of the Court of Appeal for Eastern Africa reversed.

APPEAL (No. 9 of 1956), by special leave, from a judgment of the Court of Appeal for Eastern Africa (Nihill P., Worley V.-P. and Lowe J.) (August 1, 1955), affirming a judgment of the High Court of Tanganyika (Cox C.J.) (March 17, 1955), which had dismissed the appellants' appeals from their convictions in the District Court of Dar es Salaam on two counts, the first charging them with conspiracy to obstruct, prevent, pervert or defeat the course of justice, contrary to section 110 (*a*) of the Penal Code of Tanganyika, by concealing a wall clock which they well knew was required for the purpose of an inquiry into a criminal offence, and the second charging them with retaining property feloniously stolen or obtained, contrary to section 311 (1) of the Penal Code. The present appeal was, by the Order in Council granting special leave, limited to the conspiracy count. On that count each appellant had been sentenced to one year's imprisonment.

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* *Present*: LORD OAKSEY, LORD TUCKER, LORD COHEN, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

The appellants were lawfully married in accordance with the rules of the Khoja Sect, a sub-sect of the Shia Mohammedans, and were living together in a common matrimonial home under conditions in all respects similar to a monogamous union, and the main question in this appeal was whether the doctrine of English criminal law that a husband and wife cannot be guilty of conspiracy was applicable in the circumstances to the appellants.

The magistrate decided that the rule of English law was applicable in Tanganyika but did not apply to a potentially polygamous marriage. Both appellants were convicted on both counts. The High Court and the Court of Appeal for Eastern Africa were of the same opinion as the magistrate on the two points. The female appellant's conviction on the second count was quashed by the Court of Appeal. On June 1, 1956, the appellants were given special leave to appeal limited to the count of conspiracy.

1956. Nov. 29; Dec. 3, 4. *Alan Campbell* for the appellants. The main point is whether a husband and wife who are lawfully married according to the rules of the Ismailia Khoja sect, a sub-sect of the Shia Mohammedans owing allegiance to the Aga Khan, and living in a common matrimonial home under conditions in all respects similar to a monogamous marriage, can enter into a conspiracy together contrary to section 110 (*a*) of the Tanganyika Penal Code, which the Court of Appeal for Eastern Africa held to import the doctrine of English common law that a husband and wife cannot conspire together. That court went on to hold, however, that the rule of English law did not apply to a potentially polygamous marriage. There appears to be no authority on the exact point to be decided, but in support of the contention that the doctrine should be imported irrespective of the type of marriage it may be noted that the Privy Council has recognized the validity of polygamous marriages for the purposes of legitimacy, rights to property and testamentary succession; there is, therefore, it is submitted, no warrant for excluding the common law doctrine of unity for the purposes of the criminal law having regard to the origin of the doctrine.

As the origins of the doctrine are to be found in the Old Testament (Genesis II, 21 and III, 16) which was written against the general background of polygamy which prevailed at that time, and as one of the origins (Genesis II, 21) is concerned with the making of woman and the institution of marriage arising in connexion with mythological theory as to the manner in which woman was first created from the body of Adam "bone of bone "flesh of one flesh," and as the other origin (Genesis III, 16) arises in connexion with the theory of subordination as a result of the use of the words "He shall rule over thee," there is no warrant for limiting the application of the doctrine to monogamous marriages or to forms of marital union based on the sacrament of Christian marriage; and, further, there is no warrant for excluding the application of the doctrine to forms of marital union based solely on a contractual conception, regard being had to the following passage in Blackstone's Commentaries on the Laws of England, vol. 1, para. 433: "Our law considers marriage in "no other light than as a civil contract. The holiness of the "matrimonial state is left entirely to the ecclesiastical law: the "temporal courts not having jurisdiction to consider unlawful "marriage as a sin, but merely as a civil inconvenience . . ." It is submitted that the theory of subordination (which is applicable whether the marriage is monogamous or polygamous) has been accepted as the origin and basis for the doctrine in English law: Blackstone's Commentaries, vol. 1, p. 442.

English law accepts the principle of subordination in Genesis: *Manby* v. *Scott.*[1] There is no warrant for limiting the doctrine to a monogamous marriage, because in any polygamous marriage the state of subjection is no less than in a monogamous marriage. *Phillips* v. *Barnet*[2] shows how the doctrine that husband and wife are one has been firmly embedded in our law; and *Kowbel* v. *The Queen*[3] shows the origins of the doctrine. *Nyali Ltd.* v. *Attorney-General*[4] was only concerned with the point whether the common law should be imported into the local code, but the theory on that point was dealt with in *Khoo Hooi Leong* v. *Khoo Chong Yeok*,[5] which is only cited in support of the proposition that the question whether English law is imported into the colonial code is to be decided only against the conception that injustice and oppression should be prevented. In the present case injustice and a certain amount of oppression does result by its exclusion. There are decisions of the Board where the validity of the doctrine has been accepted for the purposes of legitimacy, rights of property and testamentary succession; they are not straight on the point, because there is no authority directly in point, but if the Board has recognized the validity for this, that and the other reason, why in the circumstances of this case should it not recognize it for the present purpose?

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[1] (1659) 1 Mod. 124.
[2] (1876) 1 Q.B.D. 436.
[3] [1954] 4 D.L.R. 337.
[4] [1955] 2 W.L.R. 649; [1955] 1 All E.R. 646.
[5] [1930] A.C. 346.

When one has looked at the authorities one is thrown back to a matter of pure principle. Reliance is placed on *Srini Vasan (orse. Clayton)* v. *Srini Vasan*[6]; it by no means takes these appellants the whole way, but it shows that English courts will recognize a polygamous or potentially polygamous marriage in any circumstances. *Hyde* v. *Hyde and Woodmansee*[7] is only authority for the proposition that English courts will not grant matrimonial relief in case of polygamous marriage; in other words, they will not dissolve a polygamous marriage. The reliance placed on that case by the Court of Appeal for Eastern Africa was misconceived. [Reference was also made to *Russell* v. *Russell*,[8] *Warrender* v. *Warrender*,[9] *In the Estate of Abdul Majid, Belshah* v. *Majid*,[10] and to Dicey's Conflict of Laws, 6th ed., p. 224, Cheshire's Private International Law, 3rd ed., pp. 397, 402, 405, and 48 Law Quarterly Review, p. 341.]

On this main point it is submitted, in summary, that at all events two reasons of the Court of Appeal were wrong: their view that the doctrine of unity should not apply to a contractual marriage is clearly wrong; and to say that it should not apply to a non-Christian union again is wrong. The doctrine of English law that a husband and wife cannot conspire together is not limited to monogamous marriages or forms of marital union based on the sacrament of Christian marriage; it applies in the case of a non-Christian or polygamous marriage, or to a form of marital union based solely on a contractual conception, particularly having regard to such a case as *Srini Vasan's* case.[11] Where there is a statute applying to a community as a whole, unless there are express words to the contrary, it would be very strange if it were interpreted in one way for some members and in another way for others. In the present case there is nothing in the Code to exclude the common law defence.

As a matter of interpretation, the Court of Appeal were right in saying that section 4 imported the doctrine into the Tanganyika

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[6] [1946] P. 67; 61 T.L.R. 415; [1945] 2 All E.R. 21.

[7] (1866) L.R. 1 P. & M. 130.

[8] [1924] A.C. 687, 723–725; 40 T.L.R. 713.

[9] (1835) 2 Cl. & Fin. 488.

[10] The Times, Dec. 18, 1926; Jan. 18, 1927.

[11] [1946] P. 67.

Penal Code, and they should have held that the doctrine applied to every husband and wife whom the law of Tanganyika recognized as being lawfully married.

James Stirling Q.C. and *D. A. Grant* for the Crown. The rule of English criminal law that a husband and wife cannot conspire together does not apply at all to offences under section 110 (*a*) of the Penal Code of Tanganyika. The rule is not a rule of interpretation as provided in section 4 of the Code. The only effect of section 4 is that the word " conspire " in section 110 (*a*) has the same meaning as in English law. The English rule that two persons of a particular relationship to one another cannot alone conspire with one another is not a matter of the interpretation or meaning of the word " conspire," but is based on another principle of English law, namely, the fiction that these two persons—husband and wife—are in law one person. Section 4 of the Penal Code does not import that principle into the Code. That principle is a substantive principle of English law.

Further, section 17 (2) of the Tanganyika Order in Council, 1920, provided that criminal jurisdiction should so far as the circumstances admit be exercised in conformity with, inter alia, the Criminal Procedure and Penal Codes of India. The common law was expressly stated in the section to be in force in Tanganyika so far only as the circumstances of the territory and its inhabitants permit and subject to such qualification as local circumstances may render necessary. It is submitted, however, that section 17 (2) did not import the English rule into the law of Tanganyika. The common law only applied subject to the local laws of the colony and so far as those laws did not extend or apply. The local laws did and do extend to the particular offence of conspiracy, and they also extend or apply to the liability of a wife for crimes committed by her, e.g., section 20 of the Penal Code. There is no express provision either in the Penal Code of Tanganyika or in the Penal Code of India which excludes the English exception to the wife's responsibility in the case of criminal conspiracy. But if the general rule that a wife was liable for her crimes was laid down by the local law there was no room for the common law exception to apply and there was therefore no need for its express exclusion. Further, the Indian Penal Code which was in force in 1920 created in section 120A an offence of criminal conspiracy, and, it is submitted, a husband and wife could be found guilty of that offence even if no other person were a party to the conspiracy. Therefore, as by section 17 (2) of the Order in Council the common law was only to apply in Tanganyika subject to the Indian Penal Code, and in so far as that Code did not extend or apply, the English rule was excluded by the Indian Penal Code from the common law imported into Tanganyika. [Reference was made to Gour's Penal Law of India, 6th ed. (1955), p. 508, and to *Kowbel* v. *The Queen* [12] and *Rex* v. *McKechie*.[13]] The New Zealand and Canadian statutes are very different from this Penal Code.

It is submitted, next, that as part of the common law of England the doctrine that husband and wife cannot conspire would not extend to a husband and wife of a potentially polygamous marriage. All the courts below were right in limiting this doctrine to a case of monogamous marriage—not necessarily a Christian marriage. The doctrine was based on the unity of the spouses and not on any principle of coercion or subordination. There is no direct authority on that. The rule is really anomalous. The doctrine is conveniently set out in *Kowbel* v. *The Queen*.[14] Section 47 of the Criminal Justice Act, 1925, abolishes the presumption of coercion. The true principle is stated in Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 22, citing Hawkins' Pleas of the Crown, 1 Hawk., c. 27, s. 8, p. 448: "a "husband and wife . . . are esteemed but one person in law, and "are presumed to have but one will." [Reference was also made to Modern Law Review, 1947, vol. 10, p. 27; Dicey's Conflict of Laws, 6th ed., p. 227; Harvard Law Review, vol. 66, pp. 992, 1001; Blackstone's Commentaries, vol. 1, p. 435, and *Warrender* v. *Warrender*.[15]] *Abdul's* case [16] must have proceeded on the basis that it was a mere ceremony or rite and not a marriage at all. Only if it is the law of England can it ever become by any application of section 4 the law of Tanganyika. Monogamy does remain in England the essential tenet of a valid marriage. The doctrine is now really one in respect of a monogamous marriage. There appears to be no English case on the point. It is not in the circumstances a doctrine which should be extended, and to make applicable in Tanganyika a doctrine which heretofore in England has been limited to a monogamous marriage would be an extension: *Best* v. *Samuel Fox & Co. Ltd.*[17]

It is conceded that English law recognizes polygamous unions for various purposes for convenience, but that is far from saying that it should recognize polygamous marriages in applying the

[12] [1954] 4 D.L.R. 337.

[13] [1926] N.Z.L.R. 1.

[14] [1954] 4 D.L.R. 337.

[15] 2 Cl. & Fin. 488.

[16] The Times, Dec. 18, 1926; Jan. 18, 1927.

[17] [1952] A.C. 716; [1952] 2 T.L.R. 246; [1952] 2 All E.R. 394.

doctrine founded on English law. It does remain an anomalous rule and one which should not be extended: Winfield's History of Conspiracy and Abuse of Legal Procedure (1921), p. 88; R. S. Wright on the Law of Criminal Conspiracy and Agreements (1873), p. 75. The doctrine is based on unity and not coercion. [Reference was also made to *Baindail* (*orse. Lawson*) v. *Baindail*,[18] *Warrender* v. *Warrender*,[19] *M'Carthy* v. *De Caix*,[20] and to Phipson on Evidence, 8th ed., p. 197.] The English rule being based on a monogamous marriage should not be applied to a potentially polygamous marriage such as that of the appellants.

D. A. Grant following. The principle behind the rule is the fiction of unity between husband and wife. It could possibly be based on the presumption of coercion, but if that is so, since 1925 the presumption of coercion has gone: section 25 of the Criminal Justice Act, 1925. The fiction of unity only applied to monogamous marriages in this country. It is submitted that the rule was not incorporated into Tanganyika at all. It was found by the courts below that the rule was introduced by section 4 of the Penal Code. The submission is that section 4 relates to the principles of interpretation and the meanings to be attached to the words or expressions in the Code. The English rule which prevents a husband being charged with conspiracy with his wife is derived from two sources, (a) the meaning of "conspiracy," and (b) the English rule of the presumption of identity of man and wife. The first source is, of course, interpretation; the second source is a rule of substantive law in England. Section 4 of the Code incorporated into section 110 (*a*) the English meaning of "conspiracy"; it does not incorporate the rule of substantive law in England that a man is the same person as his wife.

Campbell in reply. If the doctrine is incorporated by section 4, then it is the respondent who seeks to exclude it, and not the appellants who seek to extend it. The dividing line between interpretation and substantive law is difficult to define. The material words of section 17 (2) of the Order in Council should be interpreted only so as to avoid giving rise to injustice and oppression: *Khoo Hooi Leong's* case.[21] All the courts below were of opinion that section 4 did bring in the English rule. Once the doctrine is imported it should not be excluded without any express warrant. As this Board has for many purposes accepted the validity of polygamous marriages, and as the legislature clearly had well in mind the notion of polygamous and monogamous marriages existing side by side, there is no warrant for excluding the doctrine in this case. There would be grave injustice if the principle were not to be imported; exclusions should not be introduced which would operate oppressively against one section of the community.

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[18] [1946] P. 122, 130.

[19] 2 Cl. & Fin. 488, 560.

[20] (1835) 2 Cl. & Fin. 568.

[21] [1930] A.C. 346, 354–355.

1956. Dec. 4. LORD OAKSEY announced that their Lordships would humbly advise Her Majesty that the appeal should be allowed, and that they would give their reasons later.

1957. Jan. 15. The reasons of their Lordships for allowing the appeal were delivered by LORD SOMERVELL OF HARROW. The appellants were charged with two offences: first, conspiring to obstruct the course of justice contra section 110 (*a*) of the Penal Code; second, retaining property feloniously stolen contra section 311 (1) of the Penal Code: this appeal is concerned with the conspiracy charge.

The first appellant is described in the charge as wife of the second appellant, and both as Ismaili Khojas. At the end of the evidence for the prosecution it was submitted for the defence that the accused being husband and wife could not be guilty of conspiracy. It was submitted that the rule of English law to this effect applied to the appellants. This raised two issues. First, whether under provisions of the law of Tanganyika, to be referred to later, this rule of English criminal law was applicable in Tanganyika; second, whether, if it was applicable, it applied to the appellants whose marriage was, it is now conceded, potentially polygamous.

The decision on the first point was, of course, in the appellants' favour. The respondent submitted before the Board that the courts below were wrong on this point, and it is convenient to deal with it first. Section 110 (*a*) of the Tanganyika Penal Code is as follows: " Any person commits a misdemeanour who conspires " with any other person to accuse any person falsely of any crime, " or to do anything to obstruct, prevent, pervert or defeat the " course of justice."

Section 4 of the Code is as follows: " This Code shall be " interpreted in accordance with the principles of legal interpreta-" tion obtaining in England, and expressions used in it shall be " presumed, so far as is consistent with their context, and except " as may be otherwise expressly provided, to be used with the "meaning attaching to them in English criminal law and shall "be construed in accordance therewith."

The question is whether the rule is incorporated into section 110 (*a*) by section 4.

The rule is stated in Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 22: "A husband and wife cannot "alone be found guilty of conspiracy, for they are considered in "law as one person, and are presumed to have but one will." The authority cited is Hawkins' Pleas of the Crown, 1 Hawk., c. 27, s. 8, p. 448. Hawkins begins by quoting the Statute Ordinacio de Conspiratoribus (33 or 21 Ed. 1) "that conspirators "be they that do confeder or bind themselves by oath, covenant," etc. He goes on to consider the scope of the offence and its punishment. He deals with this matter in subsection 8: "It "plainly appears from the words of the statute, that one person "alone cannot be guilty of conspiracy within the purport of it; "from whence it follows, that if all the defendants who are "prosecuted for such a conspiracy be acquitted but one, the "acquittal of the rest is the acquittal of that one also. Also "upon the same ground it hath been holden, that no such "prosecution is maintainable against a husband and wife only, "because they are esteemed but one person in law, and are "presumed to have but one will." As in the present case, Hawkins was considering, inter alia, whether the rule modified the generality of words used in a statute or ordinance.

Hawkins refers to Stanford's Pleas of the Crown, p. 174, which refers to the rule as accepted in the fourteenth century. Citations from other authorities and textbook writers can be found in *Kowbel* v. *The Queen.*[1] It was not disputed that the rule is part of the English criminal law.

It was submitted for the respondent that in applying section 4 of the Penal Code substantive law must be distinguished from "interpretation" and "meaning." It may be difficult to define the limits of the effect of section 4. The contrast between substantive law and interpretation does not seem to assist. The most obvious form of interpretation will extend or restrict the application of words and thereby effect the substantive law. Their Lordships are of opinion that the rule is incorporated into the provisions of section 110 (*a*). The words "conspires" and "conspiracy" in English criminal law are not applicable to husband and wife alone; the words "other person" in section

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[1] [1954] 4 D.L.R. 337.

110 (*a*), if English criminal law is applied to their "interpretation" or "meaning," cannot in this context include a spouse. On this point their Lordships agree with the courts below.

On the second point the Court of Appeal came to their conclusion "after much consideration" and their Lordships agree that the point is not an easy one.

Their Lordships accept the submission of the respondent that the rule is an example of the fiction that husband and wife are regarded for certain purposes, of which this is one, as in law one person. Some of the consequences of the fiction have been removed or modified by statute. This has not. In the criminal law of Tanganyika the words husband and wife if unqualified are not restricted to monogamous unions. If it is desired to deal with monogamous as distinct from other marriages express words are used. For example, section 155 of the Criminal Procedure Code deals in subsection (1) with the wife or husband of a person charged being a competent witness for the prosecution. Subsection (2) restricts the competence in the case of a wife or husband of a monogamous marriage.

There are several sections not restricted to monogamous marriages which may be said to recognize the "unity" of husband and wife in relation to criminal responsibility. A wife who assists her husband to escape punishment does not become an accessory after the fact (Cr. Penal Code, s. 387). Section 264 is as follows: "A person who, while a man and his wife are "living together, procures either of them to deal with anything "which is, to his knowledge, the property of the other in a "manner which would be theft if they were not married, is "deemed to have stolen the thing, and may be charged with "theft." This assumes the general common law principle that a wife could not steal from her husband. Section 161 (*d*) provides that neither husband nor wife can be made to disclose communications made by one to the other during marriage.

It is clear, of course, that the marriages primarily contemplated by the rule in England were monogamous marriages, but the rule being now part of the criminal law of Tanganyika, their Lordships are of opinion that it applies to any husband and wife of a marriage valid under Tanganyika law.

It was submitted for the respondent that the rule could not apply to the appellants unless it would apply to them if the alleged conspiracy had taken place in this country. Their Lordships do not accept this submission. Potentially polygamous marriages have been recognized for various purposes in this

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country: *Baindail* v. *Baindail.*[2] It may be that such a marriage would be recognized for the purpose of this rule. Their Lordships express no opinion on that point. The rule plainly applies here at least to marriages recognized as fully valid, and it should therefore apply in Tanganyika to marriages recognized as fully valid there. It was not suggested that the appellants' marriage was not in that category.

Their Lordships have therefore humbly advised Her Majesty that the appeal should be allowed and the convictions on the first count quashed and the sentences set aside.

Solicitors: *Theodore Goddard & Co.; Charles Russell & Co.*

C. C.

[2] [1946] P. 122; 62 T.L.R. 263; [1946] 1 All E.R. 342.

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SHEIKH BROTHERS LTD. . . . . APPELLANT;

AND

ARNOLD JULIUS OCHSNER AND ANOTHER . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

East Africa—Contract—Mistake—Licence to cut and process sisal—Provision for delivery of stipulated minimum quantity to licensor—Leaf potential insufficient for fulfilment of contractual requirements—Mutual mistake as to essential matter of fact—Contract impossible in itself—Contract void—Effect of statutory provisions—Licensor not entitled to compensation—Indian Contract Act, IX of 1872, *ss.* 20, 56.
Contract—Mistake. India.

The Indian Contract Act, 1872, provides by section 20: "Where "both the parties to an agreement are under a mistake as to a "matter of fact essential to the agreement, the agreement is void." By section 56: "An agreement to do an act impossible in itself is "void. . . . [Paragraph 3] Where one person has promised to "do something which he knew, or, with reasonable diligence, "might have known, and which the promisee did not know to

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* *Present*: Lord Oaksey, Lord Cohen, Lord Keith of Avonholm, Mr. L. M. D. de Silva.

"be impossible or unlawful, such promisor must make compensa-"tion to such promisee for any loss which such promisee sustains "through the non-performance of the promise."

By a licence agreement dated December 9, 1950, the appellant company granted, inter alia, to the first respondent licence and authority—later assigned to the second respondent—to cut, decorticate, process and manufacture all sisal then or at any time thereafter growing on certain lands, of which the appellant was the lessee, comprising about 5,000 acres in Kenya. By clause 3 of the agreement the licensee undertook, inter alia, that he would as from April 1, 1951, manufacture and deliver to the appellant or its agents for sale sisal fibre in average minimum quantities of 50 tons per month. The cutting and manufacture of sisal under the licence was carried on by the licensee until January 31, 1952, when possession of the land was resumed by the appellant at the request of the second respondent without prejudice to the rights and remedies of the appellant under the licence agreement.

Disputes between the appellant and the licensee were referred to arbitrators, the questions raised being, first, whether the agreement was void under section 20 of the Indian Contract Act by reason of mutual mistake of fact inasmuch as both parties believed, contrary to the fact, that the leaf potential of the sisal area would be sufficient to permit the manufacture and delivery of the stipulated minimum quantities throughout the term of the licence, and, alternatively, whether the agreement was impossible in itself and void under section 56 of the Act of 1872 inasmuch as the leaf potential of the sisal area made it impossible to produce the prescribed minimum quantities.

It was contended for the appellant before the Judicial Committee (1) that the mistake was not as to a matter of fact *essential* to the agreement, and (2) that even if the licence was void under section 20, section 56 was also applicable and that therefore on the finding of fact by the arbitrators that the appellant did not know, but the respondents might with reasonable diligence have known, of the impossibility, compensation was payable under section 56:—

Held, first, that having regard to the nature of the contract, which was a kind of joint adventure, it was the very basis of the contract that the sisal area should be capable of producing an average of 50 tons a month throughout the term of the licence, and the mistake was as to a matter of fact essential to the agreement. *Bell* v. *Lever Bros. Ltd.* [1932] A.C. 161; 48 T.L.R. 133 applied.

Held, secondly, that section 56 applied only where an agreement otherwise valid was rendered void by impossibility of performance. That section was to be construed as applying only to agreements which, apart from questions of performance, were enforceable agreements. It had no application to the licence agreement, which was void under section 20, and the appellant was not, therefore, entitled to compensation under section 56.

Judgment of the Court of Appeal for Eastern Africa affirmed.

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SHEIKH BROTHERS LTD. v. OCHSNER.

APPEAL (No. 41 of 1955) from a judgment of the Court of Appeal for Eastern Africa at Nairobi (December 22, 1954), which dismissed an appeal by the present appellant and affirmed a judgment of the Supreme Court of Kenya (December 11, 1953), in favour of the respondents.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: This appeal raised questions as to the effect of sections 20 and 56 of the Indian Contract Act on a licence agreement made between the appellant and the first respondent on December 9, 1950. Sections 20 and 56 were in the following terms:—

" 20. Where both the parties to an agreement are under a " mistake as to a matter of fact essential to the agreement, the " agreement is void.

" Explanation—An erroneous opinion as to the value of the " thing which forms the subject-matter of the agreement is not " to be deemed a mistake as to a matter of fact.

" Illustrations— . . ."

" 56. An agreement to do an act impossible in itself is void.

" A contract to do an act which, after the contract is made, " becomes impossible, or, by reason of some event which the " promisor could not prevent, unlawful, becomes void when the " act becomes impossible or unlawful.

" Where one person has promised to do something which he " knew, or, with reasonable diligence, might have known, and " which the promisee did not know to be impossible or unlawful, " such promisor must make compensation to such promisee for " any loss which such promisee sustains through the non-" performance of the promise.

" Illustrations—

" (*a*) A. agrees with B. to discover treasure by magic. The " agreement is void. . . . (*c*) A. contracts to marry B., being " already married to C., and being forbidden by the law to which " he is subject to practise polygamy. A. must make compensa-" tion to B. for the loss caused to her by the non-performance " of his promise."

The Court of Appeal for Eastern Africa (Nihill P., Jenkins and Briggs JJ.A.), affirming the decision of the Supreme Court of Kenya (de Lestang J.), held that the licence agreement was entered into under a mutual mistake as to a matter of fact essential to the agreement and was accordingly void under section 20, but that it was also void under section 56 since the agreement contained an obligation to do an act impossible in

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itself. They held, however, that as the agreement was void under section 20, the appellant could not recover compensation under the third paragraph of section 56 although the conditions required by that paragraph to found a claim for compensation undoubtedly existed. It was from that decision that this appeal was brought.

By the licence agreement, after reciting that the appellant was the lessee of an estate of about 10,000 acres, of which 5,000 acres or thereabouts (therein and hereinafter referred to as the sisal area) were planted with mature sisal, and that upon the treaty for the licence it had been agreed that by way of security for the fulfilment of his obligations under the licence agreement the licensee would deposit with the appellant the sum of 50,000 shillings and that that sum had been duly deposited, it was, amongst other things, provided as follows:

By clause 1 the appellant granted the licensee a licence to cut, decorticate, process and manufacture all sisal then or at any time thereafter growing upon the sisal area. By clause 2 the duration of the licence was fixed at five years from January 1, 1951, subject to determination as thereinafter mentioned.

Clause 3 contained a number of undertakings by the licensee. It is sufficient to state the following—

"(A) that he will continuously and in a proper and efficient "manner cut decorticate process and manufacture all mature "sisal now or hereafter growing on the mature sisal area:

"(B) that he will deliver all sisal fibre and tow produced by "him on the said premises to the company or to such agents "of the company as it shall from time to time direct for sale:

"(C) that he will as from the first day of April one thousand "nine hundred and fifty-one manufacture and deliver sisal fibre "in average minimum quantities of fifty tons per month: "PROVIDED ALWAYS that for the purposes of this clause "deliveries shall be calculated on the thirty-first day of December "in each year to the intent that excess deliveries in any calendar "month during such year shall be credited towards any shortfall "in any calendar month during the same year: . . .

"(E) that he will not cut any sisal on the said premises "other than mature sisal which for the purpose of this clause "shall mean sisal leaves which branch out from the top of the "sisal pole at an angle of not less than forty-five degrees:"

Clause 4 contained the following undertaking by the appellant: "(A) that it will in respect of each delivery of sisal line "fibre made to it or its duly authorized agent by the licensee and "certified by the Sisal Inspector as fit for export pay to the "licensee the sum of Shillings five hundred per ton such payment to be made on or before the expiration of seven days from "the date of the consignment note in respect of such delivery:"

Clause 5 contained provisions as to the division of the proceeds of sale as between the appellant and the licensee. It is sufficient to say that subject to the deduction by the appellant of a sum equivalent to 100 shillings per ton as development charges and to certain provisos which need not be set out in detail the proceeds were to be divided as follows:—

"(i) in respect of sisal line fibre and sansivers fibre sixty per "cent. to the company and forty per cent. to the licensee:

"(ii) in respect of tow fifty per cent. to the company and "fifty per cent. to the licensee:

"(iii) in respect of flume tow twenty-five per cent. to the "company and seventy-five per cent. to the licensee."

Clause 6 provided as follows: "If during any year of the said "term ending the thirty-first day of December the licensee's "deliveries of line fibre shall fall below the aggregate of the "average minimum monthly quantity hereinbefore provided for "then the company shall be entitled without prejudice to any "other remedies it may have hereunder to be paid out of the "moneys representing the licensee's deposit a sum equivalent to "the amount it would have received in the same year if the "licensee had cut and delivered the aggregate of the average "minimum monthly quantities hereinbefore provided for "PROVIDED that if in any subsequent year of the said term "ending the thirty-first day of December the licensee's deliveries "of line fibre shall exceed the aggregate of the average minimum "monthly quantities hereinbefore provided for the company shall "make up the licensee's deposit by refunding a sum equivalent "to the price realized in respect of such excess but not exceeding "the amount deducted therefrom in respect of the deficiency in "any previous year's deliveries."

Clause 8 provided for the automatic determination of the licence if the price of sisal fibre fell below £40 per ton. Clause 9 provided for the suspension of the licensee's obligation to deliver minimum monthly quantities of sisal in certain events such as drought and fire. Clause 11, so far as material, was in the following terms: "Subject to the provisions of clauses 9 and "10 hereof if the licensee shall fail for a period of three consecutive calendar months to cut and deliver the average minimum "monthly quantities of sisal provided for and by reason of such

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"failure the loss sustained by the company shall exceed the sum "of Shillings one hundred thousand or . . . then it shall be "lawful for the company at any time thereafter to re-enter upon "the said premises or any part thereof in the name of the whole "and thereupon the licence hereby granted shall cease and "determine but without prejudice to any right of action or "remedy of the company in respect of any antecedent breach by "the licensee of any of the agreements on his part herein "contained."

Clause 12 was an arbitration clause.

Pursuant to a right reserved to him by clause 3 (N) of the licence agreement the first respondent on or about May 1, 1951, assigned to the second respondent his rights and obligations under the licence agreement with effect from January 1, 1951.

The cutting and manufacture of sisal under the licence agreement was carried on by the respondents or one of them until January 31, 1952, when possession of the premises the subject of the licence agreement was resumed by the appellant at the request of the second respondent without prejudice to the rights and remedies of the appellant under the licence agreement.

On November 27, 1952, the appellant and respondents signed an agreement of submission of disputes between them to two arbitrators pursuant to clause 12 of the licence agreement. The arbitrators were asked to decide as preliminary points whether the licence agreement was void either (A) under section 20 because of mutual mistake, or (B) under section 56 because of impossibility.

It was clear from the pleadings that the mutual mistake alleged was that both parties believed, contrary to the fact, that the leaf potential of the sisal area would be sufficient to permit the manufacture and delivery of the minimum quantities of 50 tons per month throughout the term of the licence. It was also clear that the impossibility alleged was that the leaf potential of the sisal area made it impossible to produce the said minimum quantities over the said term.

The arbitrators held that there was no mutual mistake since there was only an error of judgment as to the leaf potential and error of judgment was not the equivalent of mistake. They decided the issue of impossibility in favour of the respondents, but they then went on to consider the application of the third paragraph of section 56 and held that the first respondent, had he exercised reasonable diligence before agreeing to the terms of the licence, might have known that it would be impossible to produce from the sisal area the stipulated minimum quantities of sisal and accordingly must pay compensation.

The respondents applied to the Supreme Court of Kenya to remit or set aside this interim award. The application came before de Lestang J. who held that the erroneous belief as to the leaf potential of the sisal area was a mistake of fact on a matter material to the agreement and remitted the application to the arbitrators to deal with on that footing. So directed, the arbitrators decided that the mistake was mutual. They adhered to their opinion that the agreement was void under section 56 but, in view of their decision under section 20, they held that compensation was not payable under the third paragraph of that section. The appellant then appealed to the Supreme Court for an order that the arbitrators' award be set aside or remitted, alleging that the mistake was not mutual and was not as to a matter of fact essential to the agreement, and that, in any event, there was a case for compensation under the third paragraph of section 56. The matter again came before de Lestang J., who dismissed the application with costs.

The appellants appealed to the Court of Appeal for Eastern Africa who, as already stated, affirmed the decision of the Supreme Court.

1956. Nov. 20, 21, 26. *Dingle Foot Q.C.*, *J. T. Woodhouse* and *Lindsay Collins* for the appellant. The issues in this case turn on the construction and application of sections 20 and 56 of the Indian Contract Act, 1872. It will be observed that section 56 covers both initial and supervening impossibility. The courts below have held that, where a contract is covered by section 56, and it is found in terms that there is impossibility, but the contract is also covered at the same time by section 20 because there is mutual mistake of fact, the promisee loses his right to compensation. That, it is contended, is wrong. This case is not one of mutual mistake of fact and therefore section 20 does not apply. Secondly, even if both section 20 and section 56 apply —and it has been found that section 56 applies—the appellant is still entitled to compensation under section 56. The sections are cumulative, and the one does not exclude the other. The appellant can only be deprived of compensation if the courts below were right in saying that as soon as section 20 comes into operation it ousts the operation of section 56.

On the first question—whether section 20 applies, i.e., whether this is a case of mutual mistake at all—nearly all the cases of

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mistake deal with a state of affairs wholly different from the facts of this case, e.g., in the sense of a mistake as to the existence or the identity of the subject-matter, or as to the identity of the contracting parties. There is a distinction between an error of judgment and a mistake of fact; it is taking it too far to say that where there is an error by the promisor, that brings the case within the category of mutual mistake. Every circumstance which would enable one of the parties to avoid a contract cannot be brought within the scope of mutual mistake, and on any view this case does not come within the definition of mutual mistake. [Reference was made to Halsbury's Laws of England, 2nd ed., vol. 23, p. 135, para. 189.] The authorities go to the existence or identity of the subject-matter or something of that sort: *Bell* v. *Lever Brothers Ltd.*[1]; *Kennedy* v. *Panama, etc., Mail Co.*[2]; *Norwich Union Fire Insurance Society Ltd.* v. *Wm. H. Price Ltd.*[3] *The Salvador*,[4] which was referred to in the court below, is a long way removed from the present case and is clearly distinguishable from it. The present contract is not something which strikes at the whole identity or existence of the subject-matter. The words of section 20 reproduce the English law. To complete the authorities on this aspect of the case there are three English cases, but they do not carry the matter much further: *Solle* v. *Butcher*[5]; *Harrison & Jones Ltd.* v. *Bunten & Lancaster Ltd.*[6]; *Leaf* v. *International Galleries*,[7] where it was said: " it is . . . " a difference of quality and value rather than in the substance " of the thing itself," and that, of course, is the test which it is sought to apply here.

All the cases where the doctrine of mutual mistake has been held to apply are cases where the mistake was as to the subject-matter involved. Different considerations apply where the difference between what the parties intended to contract for and what they in fact contracted for is simply a difference of degree. Applying that test, this case does not come within the doctrine of mutual mistake. The courts below said that where there is a case of impossibility and also a case of mutual mistake the right to compensation which would exist if it were a case of impossibility alone is lost. There are several reasons why that is wrong.

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[1] [1932] A.C. 161, 217, 233.

[2] (1866) L.R. 2 Q.B. 580.

[3] [1934] A.C. 455; 50 T.L.R. 454.

[4] (1909) 26 T.L.R. 149.

[5] [1950] 1 K.B. 671, 686, 690; 66 T.L.R. (Pt. 1) 448; [1949] 2 All E.R. 1107.

[6] [1953] 1 Q.B. 646, 659; [1953] 1 All E.R. 903.

[7] [1950] 2 K.B. 86, 94; 66 T.L.R. (Pt. 1) 1031; [1950] 1 All E.R. 693.

If there be held to be any conflict between section 20 and section 56, then, applying the rules of interpretation, it is the later section, 56, which must prevail: Maxwell on Interpretation of Statutes, 10th ed., pp. 162–163; *Wood* v. *Riley*.[8] If it were not for the operation of section 20 there would be no dispute here that the appellant would be entitled to compensation. Section 20 does not oust section 56. This appears to be a new point—there has not been any case in India directly on it. The two sections are not mutually exclusive, and in a sense they overlap. The textbooks do not take the matter much further: Pollock and Mulla on the Indian Contract and Specific Relief Acts, 6th ed., p. 328; Iyer on the Indian Contract Act, 3rd ed., p. 747. See also Halsbury's Laws of England, 3rd ed., vol. 8, para. 306, and Anson's Law of Contract, 19th ed., p. 338. All these authorities appear to think that the two cases can overlap—that there may be a case of impossibility which is also a case of mutual mistake. The illustrations to section 20 are all cases of impossibility.

Supposing, contrary to the first submission, that section 20 does apply, there is then a state of affairs in which both sections apply. The submission then is that this is not a case of mutual mistake on a matter of fact *essential* to the agreement, but is a case of impossibility and section 56 comes into operation. The crux of the appellant's case is that one cannot imagine a case where the parties entered into the contract in ignorance of the state of affairs which makes performance impossible where there is not also mutual mistake. It is impossible to imagine a case which comes within section 56 which does not also come within section 20. Section 56 contemplates two classes of cases: (a) where the promisor knows of the impossibility, and (b) where he might with reasonable diligence have known of it. In either case the promisee is entitled to be compensated for the default of the promisor. This case is concerned only with the second class of case. It would completely defeat the purpose of the legislature if the promisor in any such case could say, as he says here, " Yes, it is true that I am prima facie liable under section 56 " to pay compensation, but because there was a mutual mistake " the promisee cannot recover." That is the first way of putting it. The second way is this: section 20 deals with a state of mind; section 56 with a state of affairs: thus the conditions envisaged in the third paragraph of section 56 are satisfied, compensation is payable, and nothing except express terms in some other section can take away that right. The third way of putting

[8] (1867) L.R. 3 C.P. 26, 27.

it is: where the same facts are put forward to support a plea of mutual mistake and also a plea of impossibility of performance, then the two sections, 20 and 56, operate cumulatively, and one does not oust the other.

H. J. Phillimore Q.C. and *R. I. Threlfall* for the respondents. It is conceded that if section 20 is to apply, three requirements must be satisfied: (a) There must be a mistake of fact; (b) it must be mutual; and (c) it must be as to a matter of fact essential to the agreement. With regard to (a), first, it was covered by a finding, secondly, it formed no ground of appeal in East Africa, and, thirdly, there was no error in law in regard to it. As to (b), the appellant concedes that the mistake was mutual. With regard to (c)—which is really the substantial point in the appeal—it really all depends on the contract; was this a contract merely to recover sisal or, as is submitted, was it a contract to cut sisal from an estate having a capacity of 50 tons a month? That is a question of mixed law and fact. Any two commercial men who entered into this agreement must have accepted that the capacity was essential; it was an essential and integral element of the contract that the capacity should be there: *Nicholson and Venn* v. *Smith Marriott* [9]; *Stewart* v. *Kennedy*,[10] where it was said: "Error in substantials, such as will invalidate consent given "to a contract or obligation, must be in relation to either . . . "(5) the nature of the contract or engagement supposed to be "entered into."

The whole basis of the doctrine of mistake and of impossibility is different. Mistake essentially goes to the formation of the contract. Impossibility does not prevent an agreement from coming into being, but merely excuses performance. That is essentially the distinction. Section 56 (3) has no application where there is a mistake. The essence of impossibility is that one cannot enforce the contract; it cannot be carried out. Where there is mutual mistake it is void; and also an agreement which is impossible ab initio is void, but for different reasons. The essence of section 20 is that it declares the contract void because there is no consent: Pollock and Mulla, Indian Contract Act, 6th ed., p. 125; it would be very anomalous that a party should be required to pay compensation for something which it has never agreed to. Section 56 is in Chapter 4, which deals with the performance of contracts, so the section is concerned ostensibly with contracts which are enforceable at law. If section 56 was intended to qualify section 20 one would expect to have in it some reference back to section 20. The proper conclusion is that if a party can rely on section 20 if there is mutual mistake, then section 56 has no application. The case referred to in Pollock and Mulla as being an exhaustive review of section 56 is *Hussainbhoy Karimji (Firm)* v. *Haridas*,[11] but it is of no assistance here; it merely seeks to discuss section 56 and to apply it to a question of frustration. The order appealed from was right.

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[9] (1947) 177 L.T. 189, 191.

[10] (1890) 15 App.Cas. 108, 121.

Dingle Foot Q.C. in reply. So far as the terms of the contract go, they are in the appellant's favour; reliance is placed on clauses 6 and 11. Mutual mistake is something which goes to the substance of the subject-matter. It is difficult to find any case in England or East Africa where mutual mistake has been held to apply simply on the ground that the purchaser has got something inferior to what he expected to get. [*Nicholson and Venn* v. *Smith Marriott* [12] was referred to.] Here the complaint is not sufficient to bring it into the class of mutual mistake. It was said for the respondents that mistake goes to formation of the contract, and that impossibility does not prevent the contract from coming into being. It is submitted that the latter is wrong. Then it was said that the essence of impossibility is that the contract cannot be enforced because it cannot be carried out, whereas the essence of mistake is that there never was a contract. Again, it is submitted, that is the same error. It was conceded for the respondents that there may be cases where both sections apply—where there is mutual mistake and impossibility—and that is sufficient for the appellant. Where neither party is to blame, no question of compensation arises. Where the promisor is to blame, then, irrespective of whether the agreement is void or not, he ought to pay compensation. There is no repugnancy in the appellant's interpretation, because the third paragraph of section 56 operates quite regardless of whether section 20 applies or not. Repugnancy only arises on the respondents' interpretation.

1957. Jan. 14. The judgment of their Lordships was delivered by Lord Cohen, who stated the facts set out above and continued: In their Lordships' opinion the licence agreement provided for something of the nature of a joint adventure and was entered into on the basis that the sisal area was capable of producing sisal over the period of the agreement at the average rate of 50 tons per month.

Before their Lordships two points were argued on behalf of the appellant: (1) that the mistake was not as to a matter of

[11] A.I.R. (1928) Sind. 21.

[12] 177 L.T. 189.

fact *essential* to the agreement; (2) that even if the licence was void under section 20, section 56 was also applicable and therefor on the finding of fact by the arbitrators that the appellant did not know, but the respondents might with reasonable diligence have known, of the impossibility, compensation was payable under the third paragraph of the section.

Mr. Foot supported his argument on the first point by a reference to the judgment of Lord Atkin in *Bell* v. *Lever Bros. Ltd.*[1] Mr. Foot said that the mistake relied on was a mistake as to quality and that such a mistake, to quote Lord Atkin,[2] " will " not affect assent unless it is the mistake of both parties, and " is as to the existence of some quality which makes the thing " without the quality essentially different from the thing as it was " believed to be." He submitted that applying this citation assent was not affected in the case before your Lordships. He also relied on passages in Halsbury's Laws of England, 2nd ed., vol. 23, pp. 135, 136, where the author draws a distinction between a case of mutual mistake as to the existence of the subject-matter or of some fact or facts forming an essential and integral element of the subject-matter (see paragraph 189) and one where the contract is for the sale of the subject thereof absolutely and not with reference to any collateral circumstances (paragraph 190). Mr. Foot submitted that the facts in the present case were analogous to the latter case and not the former.

Their Lordships are unable to agree. Having regard to the nature of the contract which, as their Lordships have already said, seems to them to be a kind of joint adventure, and to the provisions in particular of clauses 3 (*c*), 4 (*a*), 5, 6 and 11, their Lordships think that it was the very basis of the contract that the sisal area should be capable of producing an average of 50 tons a month throughout the term of the licence. It follows that the mistake was as to a matter of fact essential to the agreement.

Their Lordships turn to the second point. The respondents did not argue that the facts did not establish an agreement to do an act impossible in itself, so that it is unnecessary for their Lordships to consider the meaning of the phrase " an act " impossible *in itself*." The point taken by the respondents was that the third paragraph of section 56 applied only where an agreement otherwise valid was rendered void by impossibility of performance. Their Lordships agree with the Court of Appeal for Eastern Africa that this argument is well founded.

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[1] [1932] A.C. 161; 48 T.L.R. 133.

[2] [1932] A.C. 161, 218.

The structure of the Act is worthy of note. It is divided into chapters. Chapter II, into which section 20 falls, is headed "Of Contracts, Voidable Contracts and Void Agreements." Section 10, the first section of the chapter, provides that all agreements are contracts if they are made by the *free consent* of parties competent to contract for a lawful consideration and with a lawful object and are not hereby expressly declared void. Section 14 defines free consent and provides, inter alia, that consent is free when it is not caused by, inter alia, "5, mistake "subject to the provisions of section 20. . . ."

Mutual mistake within section 20 having been found to exist at the date of the licence agreement, it necessarily follows that the licence agreement is not a contract within section 10. Neither can it be an agreement enforceable by law. Therefore, quite apart from section 56, it is a void agreement, see section 2 (*c*).

True it falls within the language of the first paragraph of section 56, but that section comes under Chapter IV, which deals not with the formation of contracts but with performance, and it seems to their Lordships reasonable to construe section 56 as applying only to agreements which, apart from questions of performance, are enforceable agreements.

It was suggested that there might be repugnancy between sections 20 and 56. The third paragraph of section 56, it was submitted, clearly covered a case of mutual mistake where neither the promisor nor promisee knew of the impossibility but it was found that the promisor might with reasonable diligence have known of it. If in such a case compensation were not payable, the argument went on, there must be repugnancy between sections 20 and 56 and therefore the latter section must prevail. (See Maxwell on the Interpretation of Statutes, 10th ed., p. 162.)

Their Lordships have already given one reason for holding that no repugnancy exists, viz., that section 56 only applies where there is, apart from any question of performance, an enforceable agreement. Another reason for rejecting this argument is to be found in the third paragraph itself. There are under that paragraph two possibilities, (1) A. the promisor knows of impossibility, B. the promisee does not, then no question of mutual mistake can arise. (2) A. did not know, but with reasonable diligence ought to have known, of the impossibility. B. did not know of it, then, says Mr. Foot, there is mutual mistake. That is literally true, but their Lordships agree with Jenkins J.A. that here also the words "or with reasonable diligence might "have known" imply a set of circumstances in which the promisor is in a different position from the promisee. In other words, the case is to be treated as being one of unilateral not mutual mistake.

For these reasons their Lordships will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs.

Solicitors: *T. L. Wilson & Co.; Field, Roscoe & Co.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*

1956
Oct. 2, 3, 4, 8;
Dec. 5.

G. H. RENTON & CO. LTD. . . . . APPELLANTS;

AND

PALMYRA TRADING CORPORATION OF PANAMA . . . . RESPONDENTS.

Shipping—Bill of lading—Port of discharge—Provision for delivery of timber at London and Hull—Strike clause—Clause permitting discharge of cargo "at port of loading or any other safe and "convenient port"—Discharge to "be deemed due fulfilment of "contract"—Validity—Hague Rules, arts. III, rr. 2, 8; *IV, r.* 4.
Contract—Construction—Repugnancy—Exceptions clause.

Timber was shipped at Canadian ports under bills of lading for carriage to London and Hull respectively "or so near thereunto as "the vessel may safely get . . ." They incorporated the Hague Rules as enacted by the Water Carriage of Goods Act, 1936, of Canada. The bills of lading provided, by clause 14 (*c*) of the printed conditions, that "should it appear that . . . strikes . . . would prevent "the vessel from . . . entering the port of discharge or there "discharging in the usual manner and leaving again . . . safely "and without delay, the master may discharge the cargo at port "of loading or any other safe and convenient port . . ." By clause 14 (*f*): "The discharge of any cargo under the provisions "of this clause shall be deemed due fulfilment of the contract . . ."

While the ship was on passage a strike broke out in the port of London followed subsequently by a strike at Hull and the shipowners caused her to proceed to Hamburg and there discharge the timber. They took no steps to forward it to England at their own expense but made it available at Hamburg to the indorsees and holders of the bills of lading on payment of the full freight. In an action against the shipowners for damages for breach of contract they contended that they had effected due delivery under the bills of lading:—

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* *Present*: VISCOUNT KILMUIR L.C., LORD MORTON OF HENRYTON, LORD TUCKER, LORD COHEN, LORD SOMERVELL OF HARROW.

Held, (1) that clause 14 (*c*), coupled with clause 14 (*f*), was not repugnant to or inconsistent with the main object or intention of these contracts; they made provision for the rights and obligations of the parties in the event of obstacles (which might fall short of frustration) arising to prevent or impede the performance of the contract in accordance with its primary terms.

Glynn v. *Margetson & Co.* [1893] A.C. 351; 9 T.L.R. 437 distinguished.

Dictum in *Mongaldai Tea Co. Ltd.* v. *Ellerman Lines Ltd.* (1920) 2 Ll.L.Rep. 639, 642 applied.

(2) That the provisions in the bills of lading on which the shipowners relied were not rendered null and void by the operation of the Hague Rules, for, although the words "loss or damage to or "in connexion with goods" in article III, rule 8, were not limited to actual loss of or physical damage to the goods, and were wide enough to cover the damages claimed, compliance with the clauses in question involved no breach of article III, rule 2, which required the carrier "properly" to carry and discharge, for the object of the rules was to define not the scope of the contract service but the manner in which it was to be performed, and "properly" meant in accordance with a sound system. Nor did such compliance amount to a deviation.

Dictum of Devlin J. in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* [1954] 2 Q.B. 402, 417; [1954] 2 All E.R. 158 applied.

Decision of the Court of Appeal [1956] 1 Q.B. 462; [1956] 1 All E.R. 209 affirmed.

Appeal from the Court of Appeal (Singleton, Jenkins and Hodson L.JJ.).

This was an appeal by the appellants, G. H. Renton & Co. Ltd. (who were plaintiffs in the action) from an order of the Court of Appeal dated December 20, 1955, reversing an order of McNair J. dated October 7, 1955, whereby he ordered that they were entitled to damages from the respondents, Palmyra Trading Corporation of Panama (who were defendants in the action) for breach of contract, such contract being contained in or evidenced by four bills of lading issued by the respondents. McNair J. ordered that the amount of the damages should, failing agreement between the parties, be assessed by a special referee or by the Admiralty Registrar. The Court of Appeal ordered that the judgment be wholly set aside and that judgment be entered for the respondents with costs.

The dispute in this case arose out of a shipment of Douglas fir, hemlock and balsam lumber in August, 1954, on board the respondents' vessel *Caspiana* (hereinafter called "the vessel") under four bills of lading, signed on their behalf, of which at all material times the appellants were indorsees and holders. The lumber was for carriage from Vancouver to London under the first two bills of lading, and from Nanaimo to London and Nanaimo to Hull under the third and fourth bills of lading respectively. The lumber carried under the third bill of lading was carried on deck and this was stated in that bill of lading. Owing to a strike in London, which was followed by a strike in Hull, the vessel proceeded to Hamburg and discharged the appellants' cargo there. No arrangements were made by the respondents to ship that cargo from Hamburg to London or Hull, but they claimed full freight on discharge at Hamburg. The appellants paid full freight under reservations of all their rights. They paid the forwarding expenses from Hamburg.

The facts are stated in the opinion of Viscount Kilmuir L.C. and are fully set out in the agreed statement of facts.[1]

A. A. Mocatta Q.C. and *R. A. MacCrindle* for the appellants. The questions are: (1) What are the main objects of the contract? and (2) Is this a provision which frustrates that object? There is no finding or plea that it was impossible to take the goods to London or Hull or that the bills of lading were frustrated by the strike. On the true construction of the bills of lading, the final discharge at Hamburg was a breach of contract.

The position at common law, as distinct from the position under the Hague Rules, is: (1) The main object of the bills of lading and a fundamental term of each is that the goods shall be carried to London and Hull in consideration of the payment of the agreed freight. This appears clearly from a reading of their terms. (2) On the principles laid down in the authorities, if clauses are found in a contract such as a bill of lading, particularly clauses forming part of a standard printed form, which conflict with the main object of the contract or its fundamental terms, they must be limited or, if necessary, disregarded so as to give effect to that object and intention or to the fundamental terms. (3) There is such a conflict here and, accordingly, the provisions of clause 14 must be rejected. Clause 14 did not provide alternative ports of discharge. Instead, clause 14 (*c*), read in conjunction with the opening words of clause 14 (*f*), sought to exonerate the respondents from liability for discharging at Hamburg and failing to achieve the main object of the contract.

[1] [1956] 1 Q.B. 462, 467–470; [1956] 1 All E.R. 209.

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The first proposition is largely a matter of fact depending on the reading of the bills of lading. Eliminating what is repugnant to the bills of lading, the shipowner might wait in London or in the nearest convenient port until the strike was over. The place of destination of the goods is a most vital term in the contracts. As to a buyer's right to documents covering the field of transit under a c.i.f. contract, see *Hansson* v. *Hamel & Horley Ltd.*,[2] which decided that a c.i.f. buyer was entitled to a continuous documentary cover right up to the named port of destination. The problem is not purely one of expense. The shipowners have not incurred any expense at all as a result of the strike. The provisions of the bills of lading show that the main object of the contract was the delivery of the goods at London and Hull: see *Leduc* v. *Ward*[3] and *Margetson* v. *Glynn.*[4] Words must be cut out of the contract and given no value if they make nonsense of its primary purpose. One takes a less drastic course if one can, but one is entitled to go the whole length.

There is no qualification on the delay which may bring the clause into operation. If it is supposed to cover circumstances which would otherwise have produced frustration it should have been so framed. Instead, it is so framed as to cover other cases as well and therefore it goes too far. It was never suggested that this contract would have been frustrated apart from this clause. It purports to discharge the contract completely at the convenient port. It may be suggested that under the clause it must reasonably appear to the master that strikes would prevent the ship from entering the port. But it must in any event be doubtful whether the question of reasonableness continues to affect the subsequent provisions of the clause. There is nothing in the clause about the length of delay, and there is no qualification of the port where the master may discharge, save that it must be "safe and convenient." That must mean safe and convenient for the ship. "Safe" when used in a charterparty means safe for the ship, and "convenient" is a connected adjective. This case is not distinguishable from *Glynn* v. *Margetson & Co.*[5] In such a case as this there would be no inconvenience if the goods were transhipped.

The principles here applicable were discussed in *Hadji Ali Akbar* v. *Anglo-Arabian & Persian Steamship Co. Ltd.*[6]; *Frenkel*

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[2] [1922] 2 A.C. 36, 44–45; 38 T.L.R. 466.

[3] (1888) 20 Q.B.D. 475, 480, 481, 483–484; 4 T.L.R. 313.

[4] [1892] 1 Q.B. 337, 341–342, 344; (H.L.) [1893] A.C. 351, 357.

[5] [1893] A.C. 351.

[6] (1906) 95 L.T. 610, 613; 22 T.L.R. 600.

v. *MacAndrews & Co. Ltd.*[7]; *Connolly Shaw Ltd.* v. *A/S Det Nordenfjeldske D/S*[8]; *Temple Steamship Co. Ltd.* v. *V/O Sovfracht*[9]; *V/O Sovfracht* v. *Temple Steamship Co. Ltd.*[10] It was argued against the appellant in the court below that clause 14 is not a deviation clause and that therefore the cases just cited are irrelevant, but there is no magic in the word "deviation." The point is that here a fundamental term of the contract is being infringed by a more general term. The concept of deviation is not restricted to departure from the via. To take undue time over a voyage amounts to a deviation.

Other cases illustrating the principle in *Glynn* v. *Margetson & Co.*[11] are *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty, Son & Co.* (*No.* 1),[12] *J. Spurling Ltd.* v. *Bradshaw*[13] and *Karsales* (*Harrow*) *Ltd.* v. *Wallis.*[14]

There is a conflict between this clause and the main object of the bills of lading. There is all the difference in the world between final discharge at Hamburg and temporary discharge. In the Court of Appeal the respondents relied on *Tillmans & Co.* v. *S.S. Knutsford Ltd.*[15]; *S.S. Knutsford Ltd.* v. *Tillmans & Co.*[16]; *Mongaldai Tea Co. Ltd.* v. *Ellerman Lines Ltd.*,[17] and *Istros* (*Owners*) v. *F. W. Dahlstroem & Co.*[18] In none of these cases did the present point arise for decision. See also *Kroll & Co.* v. *Silver Line Ltd.*[19] It was not impossible for this ship to have discharged the cargo at some port other than London and to have arranged for transhipment at a subsequent date and forwarding to London. There would have been nothing wrong in that. The event envisaged by the clause need not be one which frustrates the contract; it is enough if it merely causes some delay for the shipowners to be given the choice whether to go on or to discharge the cargo. Such a clause as this would only be valid if it contemplated an event which did not merely impede, but frustrated, performance. Special weight should be given to clauses written or stamped on a document as against printed clauses: *W. R. Varnish & Co. Ltd.* v. *Kheti* (*Owners*).[20] Here in each case the destination was typed in the appropriate space. Since the main object of the contract was to take the goods to London or Hull, it must be repugnant to this to have a clause which enables the shipowners to take them elsewhere. Succeeding generations of draftsmen have tried to make such clauses as this watertight, but it is only now that the matter is being tested in the courts. Clause 14 (*c*) and (*f*) is essentially different from the war risks clause to which the object of the contract was subject.

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[7] [1929] A.C. 545, 555, 562; 45 T.L.R. 311.

[8] (1934) 49 Ll.L.Rep. 183, 188, 190; 50 T.L.R. 418.

[9] (1944) 170 L.T. 378, 382, 383–384; 60 T.L.R. 277.

[10] (1945) 173 L.T. 373; 62 T.L.R. 43.

[11] [1893] A.C. 351.

[12] [1953] 1 W.L.R. 1468, 1470; [1953] 2 All E.R. 1471.

[13] [1956] 1 W.L.R. 461; [1956] 2 All E.R. 121.

[14] [1956] 1 W.L.R. 936; [1956] 2 All E.R. 866.

[15] [1908] 1 K.B. 185; (C.A.) [1908] 2 K.B. 385; 24 T.L.R. 454.

[16] [1908] A.C. 406; 24 T.L.R. 786.

[17] (1920) 2 Ll.L.Rep. 639.

[18] [1931] 1 K.B. 247.

[19] 1954 A.M.C. 177.

[20] (1949) 82 Ll.L.Rep. 525.

As to the Hague Rules, which were expressly incorporated in the bills of lading, article III, rule 2, provided that the ship must " properly . . . carry . . . the goods." Clause 14 is contrary to this rule because, as it stands, it would permit discharge at the port of loading, and that is not to " carry " at all within the meaning of the rule. Further, this rule, which is expressly made subject to the provisions of article IV, requires (inter alia) carriage to and discharge at a place which can be predicated as " proper." Finally, article IV, rule 4, allows certain deviations. It is exclusive of other deviations and is therefore a further ground for avoiding clause 14. Once the adventure has started the carrier can only free himself from his obligations by bringing himself within article IV, rules 1 and 2. Clause 14 goes further than that.

As to the first point relating to the obligation properly to carry and discharge the goods carried under article III, rule 2, see *Gosse Millard* v. *Canadian Government Merchant Marine Ltd.*[21] and *W. Angliss & Co. (Australia) Pty. Ltd.* v. *P. & O. Steam Navigation Co.*[22] One must have some movement of the ship before the goods are " carried." The carrier must " carry " them unless he is discharged by one of the recognized provisions of these rules. The French text of this rule in the Hague Rules (found in Carver on Carriage of Goods by Sea, 9th ed., p. 1066, and Scrutton on Charterparties, 16th ed., p. 568) supports the appellants' contentions. See the definitions of " transport " in Larousse's French Dictionary and " carriage " in the Oxford English Dictionary. They both import moving the goods from one place to another. Their primary meaning is " to convey." If goods are taken on board and, before the ship has moved, something happens (e.g., they are damaged by negligence), and it becomes necessary to unload them, article III applies. Even if clause 14 (*c*) and (*f*) were otherwise valid, the provision in clause 14 (*c*) permitting discharge at the port of loading brings

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[21] [1927] 2 K.B. 432, 434; 44 T.L.R. 143.

[22] [1927] 2 K.B. 456, 460–461; 43 T.L.R. 675.

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down its whole structure. If the Hague Rules apply, they require movement of the goods, and any clause to the contrary is bad under article III, rule 8. Clause 14 (*c*) and (*f*) is bad because it seeks to relieve the carrier from liability for " loss . . . " in connexion with goods " under that rule. If the loading is carried out by the ship the rules apply to the whole operation of loading. Article I (*e*) is not against the appellants and does not help the respondents. It merely identifies the points of time when carriage begins and ends. It does not define carriage. The adventure has started once one has loaded the goods and, once it has started, the Water Carriage of Goods Act, 1936, of Canada governs it so that the carrier carries under article III, rule 2, subject to article IV: see *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*[23] and *Svenska Traktor Aktiebolaget* v. *Maritime Agencies (Southampton) Ltd.*[24]

The Hague Rules contemplate that the voyage and its scope are something to which they apply. The shipowners cannot be said to have performed their contract properly if they have not discharged the goods at the named port. Article III, rule 8, strikes at attempts by contract to avoid the Hague Rules. Article III, rule 2, on its true construction requires (inter alia) carriage to and discharge at a place of which it can be predicated that it is " proper." Propriety of place cannot be conferred by a term which is not covered by article IV, to which article III, rule 2, is subject. One cannot " properly and carefully . . . " discharge the goods " if one discharges them at the wrong place. See the exceptions in article IV, rule 4, and Scrutton on Charterparties, 12th ed. (edited by Lord Porter), p. 502, note (*c*). The matters dealt with by article IV, rule 2, are very extensive and clause 14 is trying to give exceptions over and above these. That is the essence of the thing. If the carrier may do what the clause says, he cannot be held responsible for not discharging the cargo at London and Hull. This case is distinguishable from *Marcelino Gonzalez y Compania S. en C.* v. *James Nourse Ltd.*[25] If a contract to carry goods from Malaya to London allowed the ship to go 100 miles off her course to another port, the question would arise whether that was an excepting term or another way of saying that the carriage should be from Malaya to London, at the same time giving a method of performance. Article III, rule 8, nullifies clause 14. It is that which gives teeth to the

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[23] [1954] 2 Q.B. 402, 414 et seq.; [1954] 2 All E.R. 158.

[24] [1953] 2 Q.B. 295; [1953] 2 All E.R. 570.

[25] [1936] 1 K.B. 565.

Hague Rules when the parties to a contract try to exclude them. Article IV, rule 4, contemplates that a deviation may be a breach of the rules, and article III, rule 2, can be broken by a deviation. Article IV, rule 4, shows that the rules are concerned with geography. The provision here in question is prohibited as amounting to a deviation. [Reference was also made to *Imperial Smelting Corporation Ltd.* v. *Joseph Constantine Steamship Line Ltd.*[26]; *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*[27]; *The Australia Star*[28]; *Foscolo, Mango & Co. Ltd.* v. *Stag Line Ltd.*[29]; *Stag Line Ltd.* v. *Foscolo, Mango & Co. Ltd.*,[30] and Scrutton on Charterparties, 16th ed., p. 488.]

Eustace Roskill Q.C., *T. G. Roche Q.C.* and *Andrew Bateson* for the respondents.

[Viscount Kilmuir L.C. intimated that their Lordships did not require to hear argument on behalf of the respondents on the common law point.]

On the assumption that the Hague Rules apply, the respondents were entitled to act as they did under clause 14. It is as a matter of contract that these provisions of an international convention are brought in. Their force here is not statutory because they are brought in by a Canadian Act, and the matter is not governed by Canadian law: see Scrutton on Charterparties, 16th ed., p. 455. The present bills of lading are governed by the law of the ship's flag, which is Panamanian, and it is agreed that this should be treated as English law. On construction there is no repugnance between clause 14 and the Hague Rules. A different approach is demanded when one is dealing with the construction of a statute, on the one hand, and a contract on the other. In the latter case one construes the words less strictly; one is ascertaining the intention of the parties by reference to the language which they have used.

There is no repugnancy between the obligation to go to London and the rights given by clause 14. One cannot attribute to the parties an intention that it should never operate at all. The Hague Rules leave the parties completely free to decide what services the shipowners can render to the cargo owners and where they may discharge the cargo: see Carver on Carriage of Goods by Sea, 9th ed., p. 186. Reliance is placed on *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*[31] The Hague Rules leave shipowners free to go where they wish, but if they agree to load or discharge a cargo in a particular place they are not to seek greater exemptions than those laid down in the rules. The object of the rules is to prevent shipowners from contracting out of their liability in masses of small print, but their framers did not fetter all freedom of contract to find alternative modes of performance in the event of strikes or war. One might have a valid clause in a contract which gave a master unlimited discretion to discharge anywhere at all. It would be valid both under the Hague Rules and at common law, but one would not get many freights for one's ship. The fundamental error of the appellants' argument is that it does not distinguish between the performance of a voyage from A to B and the substituted performance of the ship proceeding to C. The words "properly and carefully" in the Hague Rules refer to physical matters and have nothing to do with the destination of the ship.

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[26] [1940] 1 K.B. 812, 839–840; 56 T.L.R. 461; [1940] 3 All E.R. 211.

[27] [1942] A.C. 154, 175; 57 T.L.R. 485; [1941] 2 All E.R. 165.

[28] (1940) 67 Ll.L.Rep. 110, 111.

[29] (1930) 38 Ll.L.Rep. 271, 276; (C.A.) [1931] 2 K.B. 48; 47 T.L.R. 278.

[30] [1932] A.C. 328; 48 T.L.R. 127.

Article III, rule 2, imposes on the carrier certain obligations in relation to those matters which the carrier agrees to perform under his contract of affreightment. The obligations therein set out must be properly and carefully carried out by the carrier only if he undertakes by his contract to perform them and not otherwise. The rule is permissive. Article IV, rules 1 and 2, give him certain rights and immunities in relation to those obligations which he agrees to perform and in relation to which article III, rules 1 and 2, apply. Article III, rule 8, invalidates any provision in the bill of lading by which a carrier seeks to relieve himself from liability or to lessen his liability for loss or damage to or in connexion with goods otherwise than as provided in article IV, rules 1 and 2. Those rules are dealing with loss of the goods or damage to them and not with the right to discharge. Article III, rule 2, deals with the proper conduct of the operations referred to and not to the place at which they are conducted, as it was held by Jenkins L.J. in the Court of Appeal.[32]

As to the meaning of "carry," a horse is carrying a man once he is mounted, even though it has not begun to trot, and similarly a ship is carrying goods even though it has not begun to move. Say a ship loads at two berths in the same port, first loading part of its cargo at berth A and then moving to berth B to load some more. If something happened to prevent her from leaving port

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[31] [1954] 2 Q.B. 402.

[32] [1956] 1 Q.B. 462, 505; [1956] 1 All E.R. 209.

(an epidemic, quarantine or a strike), then on the argument for the appellants the ship might properly discharge the goods which had been loaded at berth A, because they had been carried, but not those which had been loaded at berth B. Suppose the master of a ship had loaded one-fifth of a perishable cargo and was unable to load the rest (say, because of a strike), so that he was unable to leave port because the ship, so loaded, was unseaworthy; he would be able to discharge the cargo which had been loaded and nothing in the Hague Rules would touch the shipowners' right to receive freight. Assuming that circumstances prevented a ship which had taken goods on board from leaving the port of loading, there is no reason why the shipowners should not have made a contract that they should be entitled to freight. But, in any view, the goods are being carried when they are physically in the ship. By analogy a common carrier is a carrier before he has started on his journey.

If the argument for the appellants is right the consequence would be that in the event of war the Hague Rules would compel a ship on such a voyage as this, in the absence of any government direction, to steam up and down the Channel until the contract was frustrated and would prevent the shipowners from contracting to send her to an alternative port.

As to the construction of the Hague Rules, the reason why the clause in the bills of lading incorporating them is referred to as the paramount clause lies in the terms of section 4 of the Canadian Water Carriage of Goods Act, 1936. The phrase is commercial shorthand. It does not imply that if there appears to be repugnancy the terms of the Hague Rules shall prevail. They only prevail if there is a clear conflict. On the construction of clause 14 what Jenkins L.J. said in the Court of Appeal[33] is right.

Nothing in the Hague Rules operates to defeat or limit clause 14 or entitles the court to treat any part of it as offending against any part of the rules. Article III, rule 2, does not touch the point in question and the parties were left free to decide what the adventure was. The ship may be said to "carry" once it has the goods on board. Reliance is placed on the definition of "carriage of goods" in article I (*e*). The duty to carry the goods "properly and carefully" relates only to loss of the goods or physical damage to them. Article IV, rule 4, has no bearing on clause 14 (*f*). As to article III, rule 8, clause 14 (*c*) and (*f*) are not covenants in a contract of carriage lessening any liability for

[33] [1956] 1 Q.B. 462, 502.

loss or damage to or in connexion with goods within that rule. That rule is only dealing with physical loss or damage. [*Kroll & Co.* v. *Silver Line Ltd.*[34] and *Hirsch Lumber Co.* v. *Weyerhaeuser Steamship Co.*,[35] decided in the American courts, were referred to.]

The respondents do not argue the point that if the provision permitting discharge at the port of loading is unreasonable it is severable and ought to be severed, because they could hardly succeed on it in isolation.

T. G. Roche Q.C. following. Under clause 14 the goods may be discharged at the port of loading. It follows from article I (*e*) of the Hague Rules, the definition of "carriage of goods," that goods are being carried once they are loaded. To "carry" may mean to "transport," but a floor may be said to be carrying a load of 20 tons in the sense of supporting it, although it is not moving, and a statesman may be said to be carrying a heavy burden of responsibility, although he may not move from place to place. In the passage outside this House there is a painting of the standard of Charles I being raised at Nottingham at the beginning of the Civil War. The standard bearer is carrying it when he holds it aloft, although he is standing still. In article III, rule 2, the general meaning of "carry" is not cut down.

A. A. Mocatta Q.C. in reply. Article III, rule 2, is not permissive but mandatory, using mandatory language. Its whole framework shows that it deals with matters which cannot be escaped or excused save under article IV: see Scrutton on Charterparties, 12th ed., p. 495, note (*m*), and p. 502, note (*c*). The first passage is also found at p. 474 of the 16th edition in the same form, save that the alternative view is indicated. The object of the Hague Rules is to achieve uniformity. Article III, rule 8, covers not only careless performance but also non-performance; note the word "failure." The contrary view would be a radical departure from the meaning of the words used. This is not conclusive in favour of the appellants but it bears on the meaning of "properly . . . discharge." In *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*[36] the question of the shipowners' liability in relation to discharge did not arise for decision. The appellants rely on article IV, rule 4. Article III, rule 2, should be given its natural meaning. It is not permissible to escape obligations imposed by the rules by a clause purporting to "deem" that such obligations have been fulfilled. [*Coventry*

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[34] 1954 A.M.C. 177.

[35] 1956 A.M.C. 1294.

[36] [1954] 2 Q.B. 402.

Sheppard & Co. v. *Larrinaga Steamship Co. Ltd.*[37] and *The Australia Star*[38] were referred to.] "Carry" does not merely mean to bear up when the goods are put aboard; its primary meaning is to transport. "Properly . . . carry" must have some regard to the route. Article III, rule 8, covers a failure to carry or a case of misdelivery just as much as physical damage. Here there is a loss in connexion with goods within this rule. The law expressed in the American cases developed on different lines from ours. The Hague Rules were expressly incorporated in this contract and the House should give effect to them rather than let them be whittled away.

Their Lordships took time for consideration.

Dec. 5. Viscount Kilmuir L.C. My Lords, this appeal arises out of a claim by the appellants under four bills of lading in similar form issued by the respondents as shipowners and providing for the carriage of timber in the vessel *Caspiana* from Canada to (in the case of three bills of lading) London and (in the case of the remaining bill of lading) Hull. The short question raised is whether the respondents can sucessfully rely on clause 14 (*c*) and (*f*) of the bills of lading in finally discharging the timber at Hamburg against payment of freight appropriate for carriage to London and Hull; and thereafter failing to take any steps to have the goods forwarded to these ports. By reason of the final discharge of the goods at that port the appellants suffered damage. McNair J. held that in these circumstances the respondents were liable to the appellants. The Court of Appeal (Singleton, Jenkins and Hodson L.JJ.) held that the respondents were freed from liability by the clause.

As a fair example on all material points I take the first bill of lading, No. LN-4, the material terms of which (on p. 2) are: "Shipped at Vancouver B.C. in apparent good order and condition, weight, measure, marks, numbers, quality, contents and value unknown, . . . on board the good vessel called the *Caspiana* for carriage to London, England or so near thereunto as the vessel may safely get always afloat, the following goods [certain quantities of Douglas fir lumber] . . . which are to be delivered in the like good order and condition at the aforesaid port unto order of shipper . . . or his or their assigns, he or they paying freight plus other charges incurred in accordance with the provisions contained in this bill of lading.

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[37] (1942) 73 Ll.L.Rep. 256.

[38] 67 Ll.L.Rep. 110.

"Freight: collect at destination . . . In accepting this bill of "lading the merchant expressly accepts and agrees to all its "stipulations, whether written, printed, stamped or otherwise "incorporated, as fully as if they were all signed by the "merchant."

Stamped across the front of each bill of lading was "Subject "to Chamber of Shipping War Risks Clauses Nos. 1 and 2."

These clauses are: "(1) No bills of lading to be signed for "any blockaded port and if the port of discharge be declared "blockaded after bills of lading have been signed, or if the port "to which the ship has been ordered to discharge either on "signing bills of lading or thereafter be one to which the ship "is or shall be prohibited from going by the government of the "nation under whose flag the ship sails or by any other government, the owner shall discharge the cargo at any other port "covered by this charterparty as ordered by the charterers (provided such other port is not a blockaded or prohibited port as "above mentioned) and shall be entitled to freight as if the ship "had discharged at the port or ports of discharge to which she "was originally ordered. (2) The ship shall have liberty to "comply with any orders or directions as to departure, arrival, "routes, ports of call, stoppages, destination, delivery or otherwise howsoever given by the government of the nation under "whose flag the vessel sails or any department thereof, or by "any other government or any department thereof, or any "person acting or purporting to act with the authority of such "government or of any department thereof, or by any committee "or person having, under the terms of the war risks insurance on "the ship, the right to give such orders or directions and if by "reason of and in compliance with any such orders or directions "anything is done or is not done, the same shall not be deemed "a deviation, and delivery in accordance with such orders or "directions shall be a fulfilment of the contract voyage and the "freight shall be payable accordingly."

On p. 1 is set out:

"I. DEFINITION.

"Wherever the term 'merchant' is used in this bill of lading, "it shall be deemed to include the shipper, the receiver, the "consignee, the holder of the bill of lading and the owner of the "cargo.

"II. PARAMOUNT CLAUSE.

"The Hague Rules contained in the International Convention "for the Unification of certain rules relating to Bills of Lading, "dated Brussels August 25, 1924, as enacted in the country of "shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding "legislation of the country of destination shall apply, but in "respect of shipments to which no such enactments are compulsorily applicable, the terms of the said convention shall "apply.

"With respect to goods loaded at a Canadian port, the Water "Carriage of Goods Act, 1936, of the Dominion of Canada, shall "be effective. . . .

"III. JURISDICTION.

"Any dispute arising under this bill of lading shall be decided "in the country where the carrier has his principal place of "business, and the law of such country shall apply. . . .

"14. (c) Should it appear that epidemics, quarantine, ice,— "labour troubles, labour obstructions, strikes, lockouts, any of "which onboard or on shore—difficulties in loading or discharging would prevent the vessel from leaving the port of "loading or reaching or entering the port of discharge or there "discharging in the usual manner and leaving again, all of which "safely and without delay, the master may discharge the cargo "at port of loading or any other safe and convenient port. . . .

"(*f*) The discharge of any cargo under the provisions of this "clause shall be deemed due fulfilment of the contract. If in "connexion with the exercise of any liberty under this clause "any extra expenses are incurred, they shall be paid by the "merchant in addition to the freight, together with return "freight if any and a reasonable compensation for any extra "services rendered to the goods."

In the case of one bill of lading (No. LN-78) the Hague Rules did not apply since the goods covered were carried on deck.

At the time of sailing from British Columbia labour relations were tranquil at United Kingdom ports, but at the end of September, 1954, while the vessel was on passage, a strike broke out among dock workers in the port of London. The vessel was due to arrive off Dungeness on October 13, 1954, and to dock in London the following day. On October 13 the strike continued to prevail in London, and at about 12.15 p.m. on that day the respondents cabled the master to proceed to Hamburg. The vessel arrived at Hamburg on October 15, 1954, and began to discharge the cargo originally destined for London on October 16, 1954. By October 20, 1954, the strike had spread to certain other ports, and on that date the strike affected Hull. The respondents completed the discharge at Hamburg of the London cargo on October 26, 1954. On that date they also began to discharge at Hamburg the Hull cargo, and completed this on November 1, 1954. On the same day work was resumed at all United Kingdom ports affected by the strike, and although a smaller strike again broke out that day in London, by November 4, 1954, there was a full resumption of work. The respondents took no steps to forward or tranship any part of the cargo discharged at Hamburg to the United Kingdom, nor did they pay for storage costs incurred at Hamburg. They insisted, before releasing the goods to the appellants at Hamburg, that the full bill of lading freight should be paid; this was done under protest.

The appellants' submissions fell under two main heads. They contended that the respondents' action in finally discharging the goods at Hamburg constituted a breach of contract upon the true construction of the bills of lading. This contention was independent of the operation of the Hague Rules. Secondly, they submitted that in relation to the three bills of lading to which the Hague Rules applied the provisions upon which the respondents relied as excusing them from liability for the final discharge at Hamburg were rendered null and void by the operation of the rules.

On the first contention it was submitted that in this case the main object and intent of the contract is the carriage of the timber to London or Hull and that clause 14 (*c*) and (*f*) do not provide for alternative ports of discharge but seek to exonerate the respondents from liability for failure to achieve this main object. Mr. Mocatta submitted that, while there might be nothing inconsistent with this object in a provision permitting discharge at Hamburg and subsequent forwarding to the named ports by the respondents, clause 14 (*f*) purported to provide that delivery at Hamburg shall be deemed due fulfilment of the contract and thus the provisions of the clause are repugnant to the purpose of the contract.

In support counsel for the appellants referred us to a number of cases upon contracts generally and bills of lading in particular whose effect was, in his submission, that contractual provisions inconsistent with the main object of the contract should be disregarded. He placed reliance on the well-known passage in the judgment of Lord Esher M.R. in *Leduc* v. *Ward*.[1] We were also referred to various passages in the judgments in *Glynn* v.

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[1] (1888) 20 Q.B.D. 475, 480, 481; 4 T.L.R. 313.

Margetson & Co.[2] in the Court of Appeal and to the speeches in this House, especially to that of Lord Halsbury, where he says: "Looking at the whole of the instrument, and seeing what one "must regard . . . as its main purpose, one must reject words, "indeed whole provisions, if they are inconsistent with what one "assumes to be the main purpose of the contract. The main "purpose of the contract was to take on board at one port and "to deliver at another port a perishable cargo."

Counsel emphasized, as had McNair J., that after what had been said by Lord Sumner in *Frenkel* v. *McAndrews & Co. Ltd.*,[3] Branson J. felt constrained in *Connolly Shaw Ltd.* v. *A/S Det Nordenfjeldske D/S*[4] to limit the operation of a clause apparently based on Lord Sumner's words. Branson J. restricted the operation of the clause to such acts as would not frustrate "the "object of the voyage, that is to say the safe carriage of the "cargo, subject to the exceptions which are provided by the bill "of lading."[5]

It is necessary in considering the authorities on which Mr. Mocatta relies to consider carefully the form of the deviation clauses in each case. They were invariably in so extensive a form that, if they were fully and literally construed, the shipowners had a complete discretion to delay intolerably and so defeat the main object and intent of the contract if they so desired. The distinction between these cases and that before your Lordships' House has been so well stated by Jenkins L.J. that I find it impossible to improve on his words, which I quote[6]: "It seems to me that there is a material difference between a "deviation clause purporting to enable the shipowners to delay "indefinitely the performance of the contract voyage simply "because they choose to do so, and provisions such as those "contained in clause 14 (*c*) and (*f*) in the present case, which "are applicable and operative only in the event of the occurrence "of certain specified emergencies. The distinction is between a "power given to one of the parties which, if construed literally, "would in effect enable that party to nullify the contract at will, "and a special provision stating what the rights and obligations "of the parties are to be in the event of obstacles beyond the "control of either arising to prevent or impede the performance "of the contract in accordance with its primary terms."

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[2] [1892] 1 Q.B. 337; (H.L.) [1893] A.C. 351, 357.

[3] [1929] A.C. 545, 562, 564; 45 T.L.R. 311.

[4] (1934) 49 Ll.L.Rep. 183, 188; 50 T.L.R. 418.

[5] 49 Ll.L.Rep. 183, 191.

[6] [1956] 1 Q.B. 462, 502; [1956] 1 All E.R. 209.

Mr. Mocatta argued that the obstacles must be of such a kind as to amount to a frustration or, in other words, that they must prevent and not merely impede the performance of the contract. I cannot agree. This would be a most difficult and impractical prerequisite. I cannot see why the parties cannot contract to meet emergencies arising from circumstances beyond the control of the shipowners, even if they may be something short of frustration. It seems much more reasonable to provide for such an emergency in advance than to leave it to prolonged post mortem speculation.

It is a buttress to this approach to find that the validity of clauses comparable to those now under consideration was assumed some 50 years ago, has apparently not been since attacked, and was affirmed in an obiter dictum of Greer J. in *Mongaldai Tea Co. Ltd.* v. *Ellerman Lines Ltd.*[7]

Mr. Mocatta accepted that the object and intent of the contract was made subject to the two war risks clauses set out above which provide a substituted method of performance of the contract. This being so, I find all the more difficulty in rejecting the clauses in issue even although they are printed and the war risks clauses are introduced by a stamp.

I therefore reject the first contention of the appellants.

On the second contention, that sub-clauses (*c*) and (*f*) of clause 14 are struck at by article III, rules 2 and 8, of the Hague Rules, the relevant provisions of the Hague Rules would appear to be:

"ARTICLE III, Rule 2.

"Subject to the provisions of article IV, the carrier shall "properly and carefully load, handle, stow, carry, keep, care "for and discharge the goods carried."

"ARTICLE III, Rule 8.

"Any clause, covenant or agreement in a contract of carriage "relieving the carrier or the ship from liability for loss or damage "to or in connexion with goods arising from negligence, fault "or failure in the duties and obligations provided in this article "or lessening such liability otherwise than as provided in these "rules, shall be null and void and of no effect. . . ."

"ARTICLE IV, Rule 4.

"Any deviation in saving or attempting to save life or "property at sea, or any reasonable deviation shall not be "deemed to be an infringement or breach of these rules or of

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[7] (1920) 2 Ll.L.Rep. 639, 642.

"the contract of carriage, and the carrier shall not be liable for "any loss or damage resulting therefrom."

I reject the respondents' submission that the damage in this case was not "loss or damage to or in connexion with goods" within article III, rule 8. So to hold would be to give no effect to the words "or in connexion with."

The appellants argued that under article III, rule 2, the respondents were obliged, inter alia, properly to carry and discharge the goods carried. The appellants submitted that this involved discharging at a "proper" port and that Hamburg was not such a port. The natural and ordinary meaning of "properly" in antithesis to "carefully" in the phrase "properly and carefully load, handle, stow, carry, keep, care for "and discharge" is in accordance with a sound system. It has not a geographical significance. We are asked to infer that it has, first from the important statement of the general function of the rules of Wright J. (as he then was) in *Gosse Millard* v. *Canadian Government Merchant Marine Ltd.*[8] and in *W. Angliss & Co. (Australia) Pty. Ltd.* v. *P. & O. Steam Navigation Co.*[9] Secondly, the connotation is alleged to arise from the initial words of article III, rule 2, "Subject to the provisions of article IV," and from article IV, rule 4. In support there was quoted note (*c*) at p. 502 of the 12th edition of Scrutton on Charterparties and Bills of Lading, whose senior editor was Lord Porter. I have carefully considered these submissions, but they do not enable me to give a strained construction to a simple word.

It was also argued that the word "carry" in article IV, rule 2, meant transport from one place to another and that, as the clause here in question permitted discharge at the port of loading, that clause must go. I cannot accept either that meaning of "carry" or the implication that it is impossible for the parties to provide for discharge in the port of loading in any circumstances.

Finally it was submitted that clause 14 allows a deviation not permitted by article IV, rule 4. I do not think that I need say more than that in my opinion this argument must fail.

For all these reasons I would dismiss this appeal.

Lord Morton of Henryton. My Lords, in this case I find myself in agreement with the Court of Appeal, but as I am

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[8] [1927] 2 K.B. 432, 434; 44 T.L.R. 143.

[9] [1927] 2 K.B. 456, 460–461; 43 T.L.R. 675.

H. L. (E.)

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G. H. RENTON & CO. LTD. *v.* PALMYRA TRADING CORPORATION OF PANAMA.

Lord Morton of Henryton.

differing from the learned trial judge, who is so experienced in these matters, I feel that I ought to state my reasons briefly in my own words.

The first question arising on this appeal is whether, apart from the question raised under the Hague Rules, sub-clauses (*c*) and (*f*) of clause 14 of the four bills of lading now in question are valid and effective so as to make discharge of the goods at Hamburg a performance of the respondents' contract. For the sake of simplicity I shall deal only with the contract contained in the bill of lading No. LN-4, since there is no difference between the four contracts for the purpose of the question now under consideration. The contract provides for carriage of the goods to London " or so near thereunto as the vessel may safely " get always afloat "; but I do not find that the obligation to carry to London is " unqualified," and it is at this point that I part company with the learned judge. On the same page of the bill of lading there are typed the words: " Subject to Chamber " of Shipping war risks clauses Nos. 1 and 2." [His Lordship read the clauses and continued:]

To my mind, my Lords, by making the obligation to carry to London subject to the two clauses just quoted, the parties have inserted a proviso qualifying the obligation to carry the goods to London and providing a substituted method of performing the contract, and earning the freight, on the occurrence of the events specified in the war risks clauses. This must surely be the effect of the concluding words of each clause.

Lower down on the same page of the bill of lading are the words: " In accepting this bill of lading the merchant expressly " accepts and agrees to all its stipulations, whether written, " printed, stamped or otherwise incorporated, as fully as if they " were all signed by the merchant." On the other page of the bill of lading there are printed a number of stipulations whereof I need only quote clause 14 (*c*) and (*f*). [His Lordship read them and continued:] These two clauses, read together, constitute a further proviso, again providing a substituted method of performing the contract and earning the freight on the occurrence of the events therein specified.

Mr. Mocatta, for the appellants, contended that sub-clause 14 (*c*), read in conjunction with the first sentence of sub-clause 14 (*f*), was in conflict with the " main object and intention of " the contract," namely, that the goods were to be carried to London, and must accordingly be modified or rejected, in accordance with the principles stated in this House and in the Court of Appeal in *Glynn* v. *Margetson & Co.*[10]

My Lords, I can see no conflict. The contract contained in the bill of lading must be read as a whole. So read, it provides, in effect, that the goods must be carried to London unless there occurs an event specified in one or other of the provisos already mentioned; but if such event happens, the goods may be discharged elsewhere, and such discharge is to be deemed to be due fulfilment of the contract. No conflict arises when an obligation in a contract, unqualified in its terms as it is first stated, is subsequently qualified by a proviso modifying or altering the obligation if certain events happen which are outside the control of either party. The original obligation and the qualification of it both form part of the intention of the parties and neither part is repugnant to the other. I add, in deference to one portion of Mr. Mocatta's argument, that I can see no ground for distinguishing the incorporation of the war risks clauses from the incorporation of clause 14 (*c*) and (*f*). It is true that if there is a conflict between general printed conditions and special written conditions bearing directly upon the particular contract "the "general words must be limited so that they shall be consistent "with and shall not defeat the main object of the contracting "parties." See *per* Fry L.J. in *Margetson* v. *Glynn.*[11] In the present case, however, I reject the suggestion of a conflict, for the reasons which I have already given.

The second question arising on this appeal is whether the provisions of clause 14 (*c*) and (*f*) are null and void by reason of article III, rule 8, of the rules generally known as the Hague Rules, as scheduled to the Canadian Water Carriage of Goods Act, 1936. These rules apply to three out of the four transactions which are the subject of this appeal, by reason of a clause in the bills of lading. They do not apply to the fourth transaction as the goods were carried on deck and were stated in the bill of lading to be so carried. Article III, rule 8, of the rules is as follows: "Any clause, covenant or agreement in a contract of "carriage relieving the carrier or the ship from liability for loss "or damage to or in connexion with goods arising from negli-"gence, fault or failure in the duties and obligations provided in "this article or lessening such liability otherwise than as pro-"vided in these rules, shall be null and void and of no effect. A

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[10] [1892] 1 Q.B. 337; (H.L.) [1893] A.C. 351.

[11] [1892] 1 Q.B. 337, 344.

"benefit of insurance or similar clause shall be deemed to be a "clause relieving the carrier from liability."

Mr. Mocatta contended (1) that sub-clauses (*c*) and (*f*) of clause 14 purport to relieve the carriers from "loss . . . in connexion with goods," within the meaning of article III, rule 8; (2) that the liability from which the carriers are thus relieved is one which arises from "failure in the duties and obligations "provided" in article III, and in particular in the duty "properly to carry . . . and discharge the goods carried" laid upon carriers by article III, rule 2; (3) that accordingly these sub-clauses are null and void and of no effect by reason of article III, rule 8.

As to point (1), Mr. Roskill, for the respondents, submitted that the words "loss or damage to or in connexion with goods" refer only to actual loss of the goods or physical damage to the goods. The Court of Appeal did not find it necessary to decide this point, but the contrary view is the first step in Mr. Mocatta's argument on this branch of the case, and I shall state my view upon it shortly, although, as will appear, I find that Mr. Mocatta's argument fails on other grounds.

My Lords, I find it quite impossible to limit the words in question in the manner suggested by Mr. Roskill. In effect, he is asking your Lordships to read the words as if they were "loss "of or damage to goods" and to give no effect to the words "or in connexion with." In my view, the phrase covers four events—(a) loss "to" goods (whatever that may mean); (b) damage to goods; (c) loss in connexion with goods; (d) damage in connexion with goods. Comparing the wording of article III, rule 8, with other clauses in which loss or damage are mentioned, it would seem clear that the words "or in connexion with" were inserted in order to give a wider scope to the clause, and, in my opinion, they are wide enough to cover, for example, the loss or damage sustained by the appellants in having to bear the cost of transhipping the goods from Hamburg and of storage at that port. For these reasons I accept the first head of Mr. Mocatta's argument.

In my view, however, Mr. Mocatta's second contention is ill-founded. I construe the words "shall properly and carefully "carry and discharge the goods carried" as meaning that the carrier must perform the duties of carriage and discharge imposed upon him by the contract in a proper and careful manner. In *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*[12]

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[12] [1954] 2 Q.B. 402, 417–418; [1954] 2 All E.R. 158.

Devlin J. said: "There is, however, a third interpretation to "article III, rule 2. The phrase 'shall properly and carefully "'load' may mean that the carrier shall load and that he shall "do it properly and carefully: or that he shall do whatever "loading he does properly and carefully. The former interpretation perhaps fits the language more closely, but the latter "may be more consistent with the object of the rules. Their "object as it is put, I think, correctly in Carver's Carriage of "Goods by Sea, 9th edition (1952), page 186, is to define not the "scope of the contract service but the terms on which that "service is to be performed. The extent to which the carrier has "to undertake the loading of the vessel may depend not only "upon different systems of law but upon the custom and practice "of the port and the nature of the cargo. It is difficult to "believe that the rules were intended to impose a universal "rigidity in this respect, or to deny freedom of contract to the "carrier. The carrier is practically bound to play some part in "the loading and discharging, so that both operations are "naturally included in those covered by the contract of carriage. "But I see no reason why the rules should not leave the parties "free to determine by their own contract the part which each "has to play. On this view the whole contract of carriage is "subject to the rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to "the parties themselves to decide."

My Lords, I agree with this passage, save that, to my mind, not only is the construction approved by Devlin J. more consistent with the object of the rules, but it is also the more natural construction of the language used.

Now, sub-clauses (*c*) and (*f*) of clause 14 do not seek to relieve the carrier from any liability arising from failure in the duties and obligations imposed by article III, rule 2, as so construed. Disregarding for the moment the provision that in certain circumstances the master may discharge the cargo at the port of loading, the sub-clauses merely substitute for London, in the events specified, "any other safe and convenient port." Mr. Mocatta, however, relies particularly upon the fact that sub-clause (*c*) gives the master power to discharge the cargo at the port of loading, and sub-clause (*f*) provides that such a discharge "shall be deemed due fulfilment of the contract." He submits that "carry" means "transport from one place to another"; that article III, rule 2, imposes a positive obligation upon the carrier to carry the goods, and that the goods are not carried at all if they are loaded on the vessel and then discharged at the port of loading. Consequently, sub-clauses (*c*) and (*f*), in providing that the goods need not be carried at all, relieve the carrier from an obligation provided in article III, rule 2, and are null and void under article III, rule 8.

My Lords, even if " carry " has the meaning suggested by counsel, article III, rule 2, as I construe it, does not place any obligation on the carrier to transport the goods at all, unless the contract says he is to transport them; so that if the contract says he need not carry them in a certain event, there is no conflict with article III, rule 2. This is a sufficient answer to counsel's argument, but I incline to the view that a ship does " carry " goods, within the meaning of article III, rule 2, from the moment when they are loaded on board; and I think that this view is supported by the definition of " carriage of goods " in article I (*e*): " ' carriage of goods ' covers the period from the time when the " goods are loaded on to the time when they are discharged from " the ship." The result is that Mr. Mocatta has failed to establish his second point. He sought, also, to rely upon article IV, rule 4, which is as follows: " Any deviation in saving or " attempting to save life or property at sea, or any reasonable " deviation shall not be deemed to be an infringement or breach " of these rules or of the contract of carriage, and the carrier " shall not be liable for any loss or damage resulting therefrom."

Counsel submits that a contract cannot validly permit deviations which are not covered by that rule. In my opinion, even if this submission is correct, as to which I express no opinion, the provisions of clause 14 (*c*) and (*f*) are not provisions which permit deviations. As I have already said, they provide substituted ways of performing the contract in certain events; consequently, if the master performs the contract in any of these ways, he is not deviating. See the American cases of *Kroll & Co.* v. *Silver Line Ltd.*[13] and *Hirsch Lumber Co.* v. *Weyerhaeuser Steamship Co.*[14] Mr. Mocatta also submitted that article IV, rule 4, supports the construction of article III, rule 2, for which he contends. I have carefully considered this argument, but I shall not detain your Lordships further by stating it fully and dealing with it in detail. In my opinion article IV, rule 4, throws no light on the construction of article III, rule 2.

The result is that the attack upon clause 14 (*c*) and (*f*) which is based upon article III, rule 8, must fail.

I would dismiss the appeal.

[13] 1954 A.M.C. 177.

[14] 1956 A.M.C. 1294.

Lord Tucker. My Lords, I am in complete agreement with the decision of the Court of Appeal to the effect that at common law clause 14 (*c*) and (*f*) of the bill of lading in this case, read together, are not so inconsistent with and repugnant to the primary and unqualified promise to deliver at London or Hull that they must be rejected. In the course of his judgment, Jenkins L.J. said [15]: "It seems to me that there is a material "difference between a deviation clause purporting to enable the "shipowners to delay indefinitely the performance of the con-"tract voyage simply because they choose to do so, and pro-"visions such as those contained in sub-clauses (*c*) and (*f*) of "clause 14 in the present case, which are applicable and opera-"tive only in the event of the occurrence of certain specified "emergencies. The distinction is between a power given to one "of the parties which, if construed literally, would in effect "enable that party to nullify the contract at will, and a special "provision stating what the rights and obligations of the parties "are to be in the event of obstacles beyond the control of either "arising to prevent or impede the performance of the contract "in accordance with its primary terms."

I would respectfully adopt this distinction and arrive at the conclusion that the power in the present case is undoubtedly within the latter class, and does not bring the case within the authorities relied upon by the appellants.

Once the contract is so interpreted it seems to me that in the circumstances of this case the Hague Rules will not avail the appellants. Whether on its true construction the object of article III, rule 2, is to define, not the scope of the contract service but the terms on which that service is to be performed, it is only by reference to the terms of the contract that it is possible to ascertain the proper port to which the goods are to be carried and at which they are to be discharged. Once it is determined that, in the existing circumstances, Hamburg was such a port, no question of improper carriage or discharge in a geographical sense can arise. It would therefore seem to me that a decision, with perhaps far-reaching consequences, on the extent and nature of the obligations imposed by the rule in relation to the various operations referred to is not called for. There remains, however, the question whether clause 14 (*c*) is void in toto because it provides for discharge at the port of loading in the circumstances there referred to, with the result, it is said, that by reason of sub-clause (*f*) such discharge is deemed to be due fulfilment of the contract without any carriage having been performed. In my opinion, carriage begins the moment the goods are loaded and before the ship has moved. This is, I think, the natural meaning of the word in this context and it is supported by the language of article I (*e*), which reads: "'carriage of goods' covers the period from the time when the "goods are loaded on to the time when they are discharged from "the ship." Consequently sub-clauses (*c*) and (*f*) of clause 14 are not rendered void by article III, rules 2 and 8.

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[15] [1956] 1 Q.B. 462, 502.

My Lords, I cannot think that this construction of the Hague Rules is in any way contrary to the intentions of the framers of the rules. Article IV, rule 2 (*j*), expressly exempts the carrier and ship from liability for loss or damage resulting from strikes. It is difficult to see on what principle the parties should not be at liberty to provide what is to happen in the event of a strike without waiting for the loss to occur or the contract to become frustrated. It would seem to be in the interests of carrier and holder of the bill of lading so to do, and in the absence of clear language prohibiting any such an agreement, I should be slow to arrive at the conclusion that the rules have this effect.

It only remains to say that for the reasons which have been stated by your Lordships I agree that the words "loss or damage "to or in connexion with goods" in article III, rule 8, are not confined to physical damage.

I would accordingly dismiss the appeal.

Lord Cohen. My Lords, I had written an opinion in this matter, but since doing so I have had the opportunity of reading in print the speech which has just been delivered by my noble and learned friend, Lord Morton of Henryton. I find myself in such complete agreement with him that I do not desire to add any reasons of my own for agreeing that the appeal should be dismissed.

Lord Somervell of Harrow. My Lords, in my opinion, the appellants fail, for the reasons given by the Court of Appeal. The first question is whether the printed provisions as to strikes in clause 14 (*c*) and (*f*) defeat or are repugnant to the typewritten words, which describe the voyage as one to a named destination.

Under clause 14 the master has, in my opinion, to act reasonably and, in particular, in deciding what is a convenient port, he must have regard to the consignee's convenience as well as the ship's. So construed, I think it is in no way repugnant to the typewritten words. I would adopt the distinction between the clauses which have in whole or in part come within the principle applied in *Glynn* v. *Margetson & Co.*[16] and the present clause drawn by Jenkins L.J. in the passage which has already been cited by my noble and learned friend the Lord Chancellor.

The general ambit of the Hague Rules is to be found in article III, rule 2, which has already been cited. It is, in my opinion, directed and only directed to the manner in which the obligations undertaken are to be carried out. Subject to the later provisions, it prohibits the shipowner from contracting out of liability for doing what he undertakes properly and with care. This question was considered by Devlin J. in *Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.*[17] in relation to the words "shall "properly and carefully load." I agree with his statement, which has already been cited.

Prima facie, therefore, the rules leave the parties free to contract in the terms in question here. They do not prohibit Hamburg as a destination in the events which happened, but they apply on that voyage as they would have done on the voyage to and discharge at London if there had been no strike.

The appellants submitted that even if they had to accept this view as the prima facie ambit of the rules, the strike clause in these bills of lading was invalidated because it provided for the possibility of the port of loading being the safe and convenient port for discharge. In such an event, it was argued, there was no carriage and a provision under which the ship need not carry at all must be bad. I accept neither the premise nor the conclusion. Once goods have been loaded there is, I think, "carriage" in the sense in which the word is used in these rules. This is reinforced by the definition in article I (*e*). Even if it could be said that a discharge at the port of loading as a result of war, ice, strikes, etc., prevented there being any carriage, I would not regard a provision to this effect as thereby invalidated by article III, rule 2. Such a provision is outside its scope.

An argument was also based on the wording of article IV, rule 4. It was submitted that the words there used assume that a deviation would be a breach of the rules; therefore, it is said, the rules are concerned with the course of the voyage; therefore they prohibit the provision for a substituted safe and convenient port as this amounts to a deviation.

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[16] [1893] A.C. 351.

[17] [1954] 2 Q.B. 402, 417–418.

This final step in the argument is, I think, plainly wrong if, as I have held, the appellants fail on the "repugnancy" point. The voyage to Hamburg was not a deviation. It was, in the circumstances which arose, the contractual voyage. I agree that the words of the rule assume that a deviation would or might be a breach of the rules. Deviation is a breach of the shipowners' undertaking, implied if not expressed, to proceed by a usual and reasonable route. Assuming the contractual voyage is from A to B, the undertaking as set out certainly could be and, I think, would be treated as a "term" on which the service—that is, the voyage from A to B—was to be performed. A deviation would, therefore, be a failure properly and carefully to carry. If this were only a possible view, it would be sufficient to explain the presence of the words in the rule.

The respondents submitted that the words in article III, rule 8, "loss or damage to or in connexion with goods," covered physical damage only; that the damage here was not physical, as the goods were undamaged though in the wrong place; and that, therefore, the rules did not apply. The Court of Appeal did not decide this point. In one sense it is not necessary to do so. On the other hand, if right, it is a complete and short answer to the claim. It is unnecessary to decide whether there are heads of damage which might be outside the words, but I am myself clear that the appellants' loss or damage in the present case was "to or in connexion with goods."

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *William A. Crump & Co.; Richards, Butler & Co.*

F. C.

J. C.*

1957
Jan. 14.

LLEWELLYN PERERA ABEYAWARDENE . APPELLANT;

AND

CARMEN SYLVENE WEST . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon — Roman-Dutch law — Fidei-commissum — Land — Minor fiduciaries—Valid acceptance by nearest male relations—Acceptance by fiduciaries an acceptance for fidei-commissary heirs—Fidei-commissum irrevocable — Nature of fidei-commissum in favorem familiae—Exchange of properties—Effect—Subject to same fidei-commissum—Title of fidei-commissary prevails over that of bona fide purchaser for value without notice—Entail and Settlement Ordinance (No. 11 *of* 1876) (*Legislative Enactments of Ceylon,* 1938 *Rev., c.* 54), *s.* 8.

Roman-Dutch law.

By a deed of gift in 1883 a husband and wife gave land known as "the Priory" to their daughters C. and J. in equal undivided shares subject, inter alia, to a condition that the donees should not be entitled to sell, mortgage or otherwise alienate the property, and provided that after the death of the donees the land should devolve on their lawful issue, and in the event of any one of the donees dying without lawful issue her rights in the property should devolve upon the surviving donee. The gift was accepted on behalf of the donees, who were minors, by their brother-in-law and their two brothers jointly. Pursuant to a consent order of the court made in 1896 on a petition presented by the donees' parents under the Entail and Settlement Ordinance, 1876, another property called "Sirinivasa" was in effect exchanged for "The "Priory," which latter was reconveyed by the donees to their father. By another conveyance of the same date C conveyed for consideration to her father her undivided half of "Sirinivasa." Thereafter, in 1900, J. and her father, who then held "Sirini-"vasa" in undivided moieties, partitioned the property. In 1905 J. conveyed for consideration her divided share of "Sirinivasa" to her father, who, in 1907, conveyed for consideration the whole of "Sirinivasa" to his son. Under the will of the son the land passed to trustees for charitable purposes and was divided by them into lots. The respondent's father became the purchaser of two lots—the subject-matter of this action—which he gifted to the respondent.

The appellant, and his two brothers (now dead), were the children of J., and they claimed that the deed of 1883 created a valid fidei-commissum of "The Priory" enuring for the benefit of the issue of C. and J. as fidei-commissaries; that the same fidei-commissum became attached to the substituted property "Sirini-"vasa"; that no dealing with the property by J. could thereafter revoke or fetter their fidei-commissary interest as J.'s issue, and that they were therefore entitled to the half share allotted to J. on the partition of 1900, which half share comprised the land gifted to the respondent:—

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* *Present*: EARL JOWITT, LORD OAKSEY, LORD MACDERMOTT, LORD COHEN and LORD KEITH OF AVONHOLM.

Held, first, that the gift in the deed of 1883 was validly and sufficiently accepted on behalf of the minor fiduciaries C. and J. by their brother-in-law and two brothers—three of their nearest male relations other than their father the donor.

Francesco v. *Costa* (1889) 48 S.C.C. 189 and *Lewishamy* v. *De Silva* (1906) 3 Bal. 43 applied.

Held, secondly, that the acceptance by the fiduciaries C. and J. was an acceptance for their children the fidei-commissaries. There was therefore an irrevocable fidei-commissum of "The "Priory" in favour of J.'s children by virtue of the gift and acceptance of 1883.

A fidei-commissum in favorem familiae was not confined to a fidei-commissum which went on from generation to generation (multiplex), but included that in the present case. The question whether it was perpetual or not would depend on the language used by the testator or donor.

Perezius's Praelectiones (1653), Bk. VIII, Tit. LV, para. 12; Van Leeuwen's Censura Forensis (1662), Bk. IV, ch. 12, para. 18; Pothier's Law of Obligations or Contracts, Vol. 1, p. 43 (Evans' translation); Sande's Treatise on Restraints on Alienation (1633) (Webber's translation), Pt. III, Ch. V, paras. 10, 11, 13, 14 and 15; Voet's Commentaries on the Pandects (1698–1704) (Macgregor's translation), Bk. XXXVI, Tit. I, s. 28, considered.

Perera v. *Marikar* (1884) 35 S.C.C. 138; *Soysa* v. *Mohideen* (1914) 17 N.L.R. 279; *Ex parte Orlandini*, S.A.L.R. [1931] O.P.D. 141 applied.

Crookes, N.O. v. *Watson* 1956 (1) S.A.L.R. 277 considered.

Held, thirdly, that "Sirinivasa," when received in exchange for "The Priory" must be taken to have been held in terms of the original fidei-commissum by virtue of section 8 of the Entail and Settlement Ordinance, 1876, which provided that "any "property taken in exchange for any property exchanged . . . shall "become subject to the same . . . fidei-commissum . . . as the "property for which it was given in exchange . . ."

Held, lastly, on the assumption that the respondent's father was a bona fide purchaser for value without notice of any defect in his title, that that could not avail the respondent, for under the law of Ceylon the rights of fidei-commissaries prevailed over those of bona fide purchasers; English doctrines of law had no play in this sphere: *Abdul Hameed Sitti Kadija* v. *De Saram* [1946] A.C. 208.

The plaintiffs were accordingly entitled to the land in suit.

Judgment of the Supreme Court of Ceylon (1951) 53 N.L.R. 217 reversed.

APPEAL (No. 37 of 1952) from a judgment and decree of the Supreme Court of Ceylon (October 10, 1951) reversing a judgment and decree of the District Court of Colombo (July 29, 1948).

The following facts are taken from the judgment of the Judicial Committee: The appellant was plaintiff for himself and as substituted for other two plaintiffs, his brothers, both now deceased, in an action brought in the District Court of Colombo for declarator that the original plaintiffs were entitled to a parcel of land in Colombo known as "Sirinivasa" and for other relief. The respondent was defendant in the action. She held the land under gift from her father, who bought the land in dispute (on a title traceable back to the same source from which the appellant's claim was traced), and thereafter gifted it to the respondent subject to a fidei-commissum. The District Judge (V. S. Jayawickrema A.D.J.) granted the declarator sought subject to certain conditions that it is not material here to notice. The respondent appealed to the Supreme Court (Basnayake and Gunasekara JJ.) which allowed the appeal with costs both there and below. From that judgment appeal was taken, with leave of the Supreme Court, to their Lordships' Board.

The dispute turned on the effect of a gift of land made in 1883 subject to a fidei-commissum and subsequent transactions. The material portions of the deed of gift, deed No. 2110, were in the following terms:

"Know all men by these presents that we, Mututantrige "Siman Fernando and Colomba Patabendige Maria Perera, "husband and wife residing at Horetuduwa in Panadura being "desirous of making some provision for our children and in "consideration of the love and affection we bear to our daughters "Mututantrige Cecilia Fernando and Mututantrige Jane Fernando "and for divers other good causes and considerations us hereunto "moving do hereby give, grant, assign, set over and assure by "way of gift subject to the conditions hereinafter stated, unto "the said Mututantrige Cecilia Fernando and Mututantrige Jane "Fernando (hereinafter called the donees) the following property, "to wit:

"[description of property]

"To have and to hold the said premises with the easements, "rights and appurtenances thereunto belonging or used or "enjoyed therewith or known as part and parcel thereof unto "them the said Mututantrige Cecilia Fernando and Mututantrige "Jane Fernando, their heirs, executors and administrators in "equal undivided shares forever subject however to the conditions "following that is to say that the said Mututantrige Siman "Fernando shall during his life time be entitled to take use and "appropriate to his own use the issues, rents and profits of the "said premises and that after his death and in the event of his "wife Colomba Patabendige Maria Perera surviving him she shall "during her life time be entitled to take use and appropriate to "her own use a just half of the said issues, rents and profits the "other half being taken used and appropriated by the donees to "wit, the said Mututantrige Cecilia Fernando and Mututantrige "Jane Fernando and subject also to the conditions that the said "donees Mututantrige Cecilia Fernando and Mututantrige Jane "Fernando shall not nor shall either of them be entitled to sell, "mortgage, lease for a longer term than four years at a time or "otherwise alienate or encumber the said premises nor shall the "same or the rents and profits thereof be liable to be sold in "execution for their debts or for the debts of any or either of "them and the said premises shall after their death devolve on "their lawful issues respectively and in the event of any one of "the said donees dying without lawful issue her share right and "interest in the said premises shall devolve on and revert to "the surviving donee subject however to the conditions and "restrictions aforesaid.

"And these presents further witness that Mututantrige John "Jacob Cooray also of Horetuduwa aforesaid doth hereby on "behalf of the said Mututantrige Cecilia Fernando and Mututantrige Jane Fernando, who are minors, jointly with Mututantrige "Alfred Thomas Fernando and Mututantrige James Fernando, "brothers of the said minor donees accept the gift and grant of "the said premises subject to the respective conditions aforesaid.

"In witness whereof we the said Mututantrige Siman "Fernando and Colomba Patabendige Maria Perera and we the "said Mututantrige John Jacob Cooray, Mututantrige Alfred "Thomas Fernando and Mututantrige James Fernando do set "our respective hands to three of the same tenor as these presents "at Horetuduwa aforesaid, this fourth day of October, in the "year one thousand eight hundred and eighty-three.

"Signed, sealed and delivered in the presence of us:

"Sgd. (Illegibly).
" ,, (In Sinhalese).

J. C.
1957

ABEYAWARDENE
v.
WEST.

"Sgd. JOHN J. COORAY.
" ,, A. J. FERNANDO.
" ,, JAMES FERNANDO.
" ,, N. M. FERNANDO.
" ,, L. FERNANDO.
"Sgd. C. DE A. GUNARATNE,
"*N. P.*"

There was appended to that deed the notary's docquet attesting that it had been read over and explained to the parties and that they and the subscribing witnesses were all known to him, the notary.

It was not disputed that that deed was effectual to constitute a valid fidei-commissum, subject to a question at issue between the parties as to its revocability. The plaintiff and his two brothers, now deceased, were the children of Jane and so indicated as fidei-commissarii under the deed, though not born at its date. The parcel of land thus gifted was known as "The Priory."

By application under the Entail and Settlement Ordinance, No. 11 of 1876, in the District Court of Colombo, made on June 17, 1896, in which Siman and Maria were petitioners and Cecilia and Jane and James Fernando were respondents, the petitioners asked the court to appoint James as guardian ad litem of Jane, who was then 19½ years of age, to authorize Cecilia and James as such guardian to convey "The Priory" to Siman free from all conditions and restrictions in consideration of the petitioners transferring to Cecilia and Jane another property called "Sirinivasa" subject to certain conditions which need not be here set out as they were incorporated in the order of the court next to be noticed. All parties consented to the application. The professed reason for the exchange was that it was not desirable or beneficial for Cecilia and Jane to hold in common "The "Priory" and that Siman was anxious to make better provision for these two daughters. "The Priory" was valued at Rs. 45,000 and "Sirinivasa" at Rs. 90,000.

On the following day, June 18, the District Judge pronounced the following order: "It is hereby adjudged and ordered that "James Fernando of Horetuduwa be and he is hereby appointed "guardian of Jane Fernando (the second respondent) in this "matter to represent her in these proceedings.

"It is further ordered and decreed that upon the petitioners "transferring and assigning unto the first and second respondents "Cecilia Fernando and Jane Fernando the allotments of land "(fully described in Schedule B to the said petition of the

" petitioner) situated at Edinburgh Crescent, Flower Road and " Green Path, Colombo, and the buildings thereon called and " known as ' Sirinivasa ' bearing assessment No. 8 subject to the " conditions following, that is to say, viz., that they the first and " second respondents shall not sell, mortgage or otherwise alienate " the said premises except with the consent of the petitioners or " the survivor of them and that the first petitioner shall during " his life time be entitled to take, use, enjoy and appropriate to " his own use the rents, issues and profits of the said premises " and that after his death and in the event of the second petitioner " surviving him she shall during her life time be entitled to take, " use, enjoy and appropriate to her own use one just half of the " said rents, issues and profits the other half thereof being taken, " used, enjoyed and appropriated by the first and second respondents that the said Cecilia Fernando and James Fernando as " guardian of the said Jane Fernando, do and they are hereby " authorized and empowered to convey and assign unto the said " Mututantrige Siman Fernando, the first petitioner, the aforesaid lands and premises called and known as ' The Priory ' " (fully described in Schedule A in the said petition) absolutely " and free from all conditions and restrictions contained in deed " No. 2,110 dated the 4th day of October, 1883, and that the said " Cecilia Fernando and James Fernando as guardian as aforesaid " do and they are hereby empowered and authorized to execute " and deliver the necessary deed of conveyance of the said " premises in favour of the said Mututantrige Siman Fernando " absolutely and free and clear of all conditions and restrictions."

Following on that order an exchange of lands was made by a conveyance by Cecilia and James, as guardian of Jane, of " The " Priory " to Siman " free and clear from all and every restrictions and conditions " in the deed of gift of 1883 and a conveyance by Siman and Maria " by way of gift " to Cecilia and Jane of " Sirinivasa " subject to the conditions, set out verbatim, contained in the said order of court. The respective conveyances were each dated June 23, 1896. On the same date by another conveyance Cecilia conveyed to Siman her one undivided moiety of " Sirinivasa," which she had just received from her father, in consideration of the sum of Rs. 45,000. By a fourth conveyance of the same date Siman conveyed to Cecilia " as a gift " absolute and irrevocable " " The Priory " which had just been conveyed to him by Cecilia and Jane.

So far as " Sirinivasa " was concerned Siman and Jane held this now in undivided moieties. On June 30, 1900, they having agreed on a partition, Siman by deed of indenture conveyed his undivided share in the eastern portion of " Sirinivasa " as delimited in the deed to Jane and Jane conveyed to Siman her undivided share in the western portion as delimited.

On November 30, 1905, by deed of indenture, Jane, who was now married, with consent of her husband and of her mother, Maria, conveyed her divided share of " Sirinivasa " to Siman in consideration of the sum of Rs. 75,000. Siman thereafter by indenture dated December 6, 1907, conveyed the whole of " Sirinivasa " to his son James Fernando, in consideration of the sum of Rs. 175,000. Under James's will the land passed to trustees for charitable purposes and was divided by them into separate lots. The respondent's father became purchaser, inter alia, of two of those lots. These were the subject-matter of this action and, as already indicated, were gifted to the respondent by her father subject to a fidei-commissum in favour of her issue, failing whom, her brother and his issue.

1956. Nov. 7, 8, 12, 13, 14, 15 and 22. *D. N. Pritt Q.C.*, *J. Stephenson* and *L. Kadirgamar* for the appellant. There is no dispute of fact, the appeal raises points of first principle under Roman-Dutch law. The points are: (1) Deed No. 2,110 created a valid fidei-commissum in favour of the appellant and his two brothers, subject to the various questions of acceptance essential to the irrevocability of the fidei-commissum. (2) The first point to consider with regard to the need for acceptance in a fidei-commissum of this kind is whether there must be an acceptance by the fiduciaries. It is admitted that there must be an acceptance here by the fiduciaries Cecilia and Jane. On this point both the District Judge and the Supreme Court agreed that there had to be acceptance and that there was acceptance. (3) A much more important point, which goes right down to first principles, is whether in a fidei-commissum of this kind there has to be an acceptance by the remaindermen or fidei-commissaries in order that the fidei-commissum in their favour shall be irrevocable. The submission is that if the fidei-commissum is one in favorem familiae then acceptance by the fiduciaries enures for the benefit of the fidei-commissaries. If there is a fidei-commissum with one branch of fiduciaries and then one set of fidei-commissaries afterwards, it is unicum, or simple, but if there are more than that, and it goes from son to son, then it will be multiplex. It is submitted that the present is not multiplex. The respondent's case was that, assuming that acceptance by the fiduciaries enured for the benefit of the fidei-commissaries, as the fidei-commissum is in favorem familiae that acceptance applied only when a fidei-commissum is multiplex and not unicum. The view of Basnayake J., who gave the leading judgment in the Supreme Court, was that if a fidei-commissum is merely unicum it is not in favorem familiae at all although it is made in favour of the family.

(4) The above appear to be all the main points that would have arisen if there had never been a substitution of Sirinivasa for The Priory. This fourth submission is that the Entail and Settlement Ordinance, 1876, operated validly in the application of June 17, 1896, so that the conditions remained notwithstanding the attempt in that case to depart from them. Section 8 of the Ordinance applies, and the result is that the appellant is in exactly the same position in relation to Sirinivasa as he was in relation to The Priory. See *Abeywardene* v. *Tyrell.*[1] The District Judge and the Supreme Court were both in the appellant's favour on that point. It is contended further that the application of 1896 was a nullity because the petitioners ought to have been the fiduciaries Cecilia and Jane and not the donors. (5) A plea of prescription, rejected by the District Judge. (6) The claim of the respondent was that she or her father took the property bona fide for value without notice, and that therefore they have a good title against all the world. That, it is submitted, would be against all principles of fidei-commissum law.

With regard to the above six points, the contrary to the first—that deed No. 2,110 created a valid fidei-commissum—was not argued. The second and third points are concerned with acceptance. There was in fact in this case a valid acceptance on behalf of the fiduciaries Cecilia and Jane by their two brothers and brother-in-law, and acceptance by the fiduciaries enured for the benefit of the fidei-commissaries. It is a rule which applies when the fidei-commissum is, as this was, in favorem familiae. There are three fields of authority on this point, (a) Ceylon cases, (b) South African cases, and (c) textbook writers. The Ceylon cases present a clear picture of not much short of a century of settled judicial opinion in the appellant's favour; it may be added, a case of settled conveyancing practice based on decisions. *Perera* v. *Marikar*[2] was a Full Bench decision, binding on the Supreme Court, and it plainly shows that persons in the position of the appellant get the protection of the Roman-Dutch law notwithstanding that there has been no acceptance by them. *Soysa* v.

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[1] (1938) 39 N.L.R. 505, 510.

[2] (1884) 6 S.C.C. 138.

Mohideen[3] follows the doctrine laid down in *Perera's* case,[4] and *Abeyesinghe* v. *Perera*,[5] *Ayamperumal* v. *Meeyan*,[6] *Sopinona* v. *Abeywardene*[7] and *Fernando* v. *Alwis*[8] are in the same line, each building up the settled course of judicial opinion. Then, in 1944, comes the heresy, *Carolis* v. *Alwis*,[9] in which it was held that acceptance by the fidei-commissaries was necessary. It is important to show that the heresy was repudiated and people brought back to the true faith a year or two later: *Mudaliyar Wijetunga* v. *Duwalage Rossie*[10]; *Vallipuram* v. *Gasperson*.[11]

With the exception of this one heresy there has been over 70 years a uniform course of decisions that in a case at any rate of members of the family not yet born the acceptance of the fiduciaries is sufficient to enure for the benefit of the fidei-commissaries. And, further, in the whole course of decisions there has not been a suggestion that this exception is confined to multiplex fidei-commissa and is of no avail to a unicum. That being the position, it is a reasoning which should commend itself to the Board as a matter of principle, and is the best application of the old classical writers.

The first South African case is *Ex parte Orlandini*,[12] where the view for which the appellant is contending was adopted. In the present case no one has relied on registration. The next case, *Ex parte Orchison*,[13] which followed *Ex parte Orlandini*,[14] was reversed on appeal on another point,[15] so that *Orlandini's* case[16] remains unaffected. The next South African case, *Crookes, N.O.* v. *Watson*,[17] is much more interesting; it places some small obstacle in the appellant's way in that it does not go the whole way with him. It is a Full Bench judgment of the Appellate Division of the Supreme Court of South Africa, and was a decision of three to two. *Orchison's* case[18] was not mentioned in the judgments.

There was, therefore, by ratification or otherwise, a valid acceptance by Cecilia and Jane of the deed of 1883, which created a fidei-commissum in favorem familiae, and on the true principles of Roman-Dutch law the acceptance by the fiduciaries enured for the benefit of fidei-commissaries who were unborn or otherwise incapable of accepting on their own behalf. If, indeed, it were the law of Ceylon that the exception that the fidei-commissaries need not accept only applied where the fidei-commissum was at least multiplex, one would expect that all 11 cases in Ceylon which formed the chain of authority and the chain of conveyancing practice would all be multiplex, but in every single one of those earlier cases the fidei-commissum was unicum.

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[3] (1914) 17 N.L.R. 279.
[4] 6 S.C.C. 138.
[5] (1915) 18 N.L.R. 222.
[6] (1917) 4 C.W.R. 182.
[7] (1928) 30 N.L.R. 295.
[8] (1935) 37 N.L.R. 201.
[9] (1944) 45 N.L.R. 156.
[10] (1946) 47 N.L.R. 361.
[11] (1950) 52 N.L.R. 169.
[12] S.A.L.R. [1931] O.P.D. 141.
[13] 1951 (3) S.A.L.R. (T.P.D.) 550, 554.
[14] S.A.L.R. [1931] O.P.D. 141.
[15] 1952 (3) S.A.L.R. (T.P.D.) 66.
[16] S.A.L.R. [1931] O.P.D. 141.
[17] 1956 (1) S.A.L.R. 277.
[18] 1951 (3) S.A.L.R. (T.P.D.) 550.

The fourth point is that as the result of the operation of the Ordinance of 1876, and particularly section 8, and of the substitution ordered by the court pursuant to the application of June 17, 1896, the fidei-commissum applied equally to those parts of Sirinivasa with which this appeal is concerned. [Reference was made to *Abeywardene* v. *Tyrell*[19] and *Perera* v. *De Fonseka*.[20]] As to the fifth point, no question of prescription arises here. With regard to the sixth point, Roman-Dutch law does not confer any title to property subjected to a fidei-commissum on a purchaser even if he does take bona fide and for value and without notice. Once the appellant's right was vested it could not be defeated by a sale by Jane to a bona fide purchaser for value without notice. [*Abdul Hameed Sitti Kadija* v. *De Saram*[21] was referred to.]

Frank Gahan Q.C., *R. O. Wilberforce Q.C.* and *S. N. Bernstein* for the respondent. It was said for the appellant that an even current of authority in his favour was not broken until what was described as " the heresy " in 1944. The respondent wishes to present a different picture on the authorities, and starts from the general proposition, leaving aside any question of exceptions, that a gift requires acceptance, and a gift by way of fidei-commissum requires acceptance not only by the fiduciary but by the fidei-commissary, and in the case of a person of full age and capacity that person must himself accept personally or by a duly authorized agent. Whether by fiduciary or fidei-commissary there must be acceptance. Secondly, if it is a minor whose acceptance is required, he must accept through his natural guardian or by a guardian appointed by the court. Thirdly, if the fidei-commissary is a child in utero, acceptance can be by the person who on the child's birth will become the child's natural guardian. If the fidei-commissary is a child not yet conceived he can accept only when he comes into existence. The above is the general basis of the law.

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[19] 39 N.L.R. 505, 510.
[20] (1949) 51 N.L.R. 97.
[21] [1946] A.C. 208, 216.

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One is here concerned with questions of contract. The dominant question is, what was the intention of the donor and what are the conditions that the law imposes in the circumstances? The courts have tended to accept the grafting of some exceptions, and the first case showing a recognition of an exception was *Perera* v. *Marikar*[22]; that, it is submitted, was a case of a perpetual fidei-commissum. Then, in 1903, came *De Silva* v. *Thomas Appu*,[23] where there was a gift in favorem familiae and the court said that there has to be acceptance by the members of the family who as fidei-commissaries take the absolute title to the land. The submission is that until one gets to 1914 in *Soysa* v. *Mohideen*[24] there was no authority at all for the appellant's proposition that acceptance by Jane was acceptance for her unborn issue. That case is the first application of the exception in a case where it was not a perpetual fidei-commissum. *Crookes's* case[25] rightly states the extent of the exception. Up to 1914 there is no reported decision in Ceylon or, apparently, in South Africa, which supports the view that the fidei-commissum in the present case was irrevocable. The general rule applies except where there is a perpetual gift limited to descend from generation to generation: Lee's Introduction to Roman-Dutch Law, 4th ed., pp. 385–386. In *Perera* v. *Marikar*[26] there was a fidei-commissum extending from generation to generation and not, as in the present case, an absolute title as soon as the life interest came to an end.

It is, of course, possible for the parties to agree on the nature of the gift, but the general rule in Roman-Dutch law is that unless there is something said which preserves the right of the donor the usual thing is an out and out gift subject to conditions, and if because of non-acceptance by the fidei-commissary or by reason of his death the condition does not take effect, then the property would vest in the fiduciary because the burden would be removed from the gift. There would be an absolute title in the fiduciary free from the conditions, or subject to compliance with other conditions.

It is common ground that under Roman-Dutch law there must be acceptance both by the fiduciary and by the fidei-commissary. The question is whether under the exception there is either an effective acceptance on behalf of the fidei-commissary by the first member who takes or whether that acceptance by that first member enures for the benefit of the fidei-commissary. In the present case in form it was an acceptance only on behalf of Cecilia and Jane, and did not purport to be an acceptance on behalf of unborn children. Further, the circumstances of the ratification by Cecilia and Jane negative any interests of the issue and cannot be construed as an acceptance on the part of the issue. What the parties agreed to do when they made the application of June 17, 1896, to the court was to revoke the gift of 1883 and to substitute for it another gift under different conditions, and one in which the issue would have no interest at all. Up to acceptance it is still possible to revoke. After acceptance by the fiduciaries only it is still possible for them and the donor together to do what they like with the property. So in the application of 1896 there are by the fiduciaries acts which recognize their having an interest in the property and at the same time denying any interest of the issue. It is possible for the acceptance to be in such terms as to confine it to the person himself. The application was one accepting the fiduciaries' interest in the property and assenting to a plan which cut the fidei-commissaries out. The order which the court made on that application was made on the basis of the law as it was then understood in Ceylon, and that it was right to ignore the issue because they could be regarded as having no interest.

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[22] 6 S.C.C. 138.
[23] (1903) 7 N.L.R. 123.
[24] 17 N.L.R. 279.
[25] 1956 (1) S.A.L.R. 277.
[26] 6 S.C.C. 138.

With regard to section 8 of the Ordinance of 1876, if The Priory was property which could be dealt with by the donor and the fiduciaries without any reference to the fidei-commissaries, so was Sirinivasa. Section 8 is in no way altering the rights of the parties; its effect was to give this property in exchange for The Priory, but with the issue cut out. The court was perfectly right to authorize the substitution without the fidei-commissaries, because they had already been cut out by the agreement of the parties to the application. These proceedings show a change of intention on the part of the donor with the fiduciaries which was effective to prevent thereafter there being any acceptance by the fidei-commissaries. The judgment in the 1896 application stands until it is set aside, and goes to title for present purposes. If that is right, then everything from start to finish is perfectly regular. [*Abeywardene* v. *Tyrell*[27] was referred to.]

Coming now to the operation of the rule in Perezius. He says in his Praelectiones, Bk. VIII, Tit. LV, para. 12: "Lastly the "former opinion would be more correct if the gift made to one "person is made in favour of a family in which the donor wishes

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[27] 39 N.L.R. 505, 508.

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" the property gifted to remain; for by no pact can it be revoked " in respect of after-comers; for it is sufficient in order that it " may be considered a perpetual donation that the first donee has " accepted it so that there is no need of a subsequent acceptance " . . . because it would be absurd, in order to make a fidei-commissum irrevocable, to require the acceptance of infants and " persons not yet born; so that as the gift cannot be revoked in " respect of these it follows that the same thing must be said " with regard to those who precede them . . ." On the question whether or not it was necessary to have acceptance on behalf of the issue as distinct from acceptance by the fiduciaries, it is submitted, (1) the facts of this case preclude the operation of the rule in Perezius, and (2) that the scope of the rule is not such that this case falls within it. The rule is confined to cases where the family is regarded almost as a person; where there is a gift to a family with the intention that the property shall remain permanently in the family, and where the first beneficiary is the head of the family and accepts the gift to the family.

In the first of the cases, *Perera* v. *Marikar*,[28] the gift contemplated a perpetual gift to the family. In *De Silva* v. *Thomas Appu*,[29] *Soysa* v. *Mohideen*[30] and *Abeyesinghe* v. *Perera*[31] the court purported to be bound—wrongly, it is submitted, as regards the two last cited cases—by *Perera* v. *Marikar*.[32] And then one has the court taking what, it is submitted, is the right view of the law in *Carolis* v. *Alwis*.[33] That case was dissented from in *Mudaliyar's* case,[34] which relied on *Orlandini's* case[35] which was followed in South Africa in *Orchison's* case.[36] *Ex parte Kleynhans*[37] was a typical sort of case to which the Perezian exception was intended to apply. *Crookes's* case[38] accurately states and deals with the effect of Perezius's exception. There should be no extension of the terms of the exception to the general law on the subject—it ought to be applied only in cases which clearly fall within the wording of the exception. The cases relied on by the appellant rest on a misapprehension of the Perezius rule. Steyn on The Law of Wills in South Africa, 2nd ed. (1948), pp. 300–301, 307, shows that the idea of perpetual fidei-commissa is very common, and it is submitted that whenever the appellant seeks to read " perpetual " as " irrevocable " it is not consistent with the settled conception of Roman-Dutch law. *Crookes's* case[39] was a decision of a very strong authority in South Africa, and it expressed a view about the scope and meaning of the Perezius exception which must necessarily overrule the reasoning in *Orlandini's* case[40]; they are dealing with the exception in a way which supports the argument for the respondent here; their reasoning is inconsistent with the reasoning in the other cases; and in the present case the Supreme Court of Ceylon reached in 1951 exactly the same conclusion. The line of authority in Ceylon is unbroken until 1944, then it is resumed, and then broken again in 1951, and that has been the law of Ceylon since.

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[28] 6 S.C.C. 138.
[29] 7 N.L.R. 123.
[30] 17 N.L.R. 279.
[31] 18 N.L.R. 222.
[32] 6 S.C.C. 138.
[33] 45 N.L.R. 156.
[34] 47 N.L.R. 361.
[35] S.A.L.R. [1931] O.P.D. 141.
[36] 1951 (3) S.A.L.R. (T.P.D.) 550.
[37] [1948] 2 S.A.L.R. (C.P.D.) 85.
[38] 1956 (1) S.A.L.R. 277, 288, 298, 300, 307.

No court in Ceylon has said that there was here a good acceptance for the fiduciaries. The first court said that there was ratification; the second that the point was academic. In *Francesco* v. *Costa*[41] acceptance by his grandmother on behalf of a minor donee was held sufficient, and the gift was irrevocable. In the present case it was not the natural guardian who purported to accept. [Reference was made to Voet's Commentaries on the Pandects, dealing with Fidei-commissa (Macgregor's translation), p. 172.] Here the ratification relied on is a repudiation by Cecilia and Jane of acceptance on behalf of the fidei-commissaries. There are two other cases on acceptance; *Fernando* v. *Alwis*,[42] which really turned on the construction of the deed of gift, and *Lewishamy* v. *De Silva*,[43] where acceptance by a brother on behalf of his minor brother was held good.

A subsidiary point is that even if any fidei-commissum were validly created by deed No. 2,110, the respondent's title to the land in dispute, acquired by her through Siman, a purchaser thereof, and arising from the partition between Siman, who was not a fiduciary, and Jane, who was, of their respective undivided interest in the whole of Sirinivasa (of which the land in dispute was a part), is indisputable and the appellant can have no right or title thereto. The land in dispute formed part of and was no greater in extent than the undivided interest in Sirinivasa purchased by Siman from Cecilia, a purported fiduciary, and it has not been proved that Cecilia had died or had died without issue.

Lastly, the respondent derives title from a bona fide purchaser for value without notice of any fidei-commissum. The general proposition put in Lee's Introduction to Roman-Dutch Law, 5th ed., pp. 374–375, is not intended to be exhaustive and is subject to exceptions. The law of Ceylon does give considerable protection to a bona fide purchaser for value. *Mirando* v. *Coudert*[44] applies, and the respondent is entitled to succeed in this appeal.

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[39] 1956 (1) S.A.L.R. 277.

[40] S.A.L.R. [1931] O.P.D. 141.

[41] (1889) 48 S.C.C. 189.

[42] 37 N.L.R. 201.

[43] (1906) 3 Bal. 43.

R. O. Wilberforce Q.C. following on two points only, (1) the title of the respondent to the land, quite apart from the Perezius exception, and (2) the Perezius exception. As to the first point, there is nothing irregular or unusual for a power of alienation to be conferred on a fiduciary in a document creating a fidei-commissum. [Reference was made to Frere-Smith, Manual of South African Trust Law, p. 40; Voet's Commentaries on the Pandects, Bk. 36, Tit. I, para. 63 (translation by Gane J. of South Africa, (1956), p. 433); and Chandra on the Law Relating to Fidei-commissa, (1948), Appdx., p. 191.] It was perfectly within the jurisdiction of the judge on the application of 1896 to introduce a provision in respect of alienation into the terms on which this property was to be held (assuming against the respondent that the fidei-commissum was properly accepted, had not been revoked, and that section 8 of the Ordinance of 1876 applied). There was nothing inconsistent with the application of section 8, which preserves the interests of the issue, in conferring a new power of alienation. Even if that is wrong, the respondent comes fairly and squarely within such authority as there is saying that any irregularity will not prejudice a bona fide purchaser for value. [*Kader* v. *Marrikar*[45] and *Gunatilleke* v. *Fernando*[46] were referred to.]

Immediately before the 1896 proceedings either there was not a valid acceptance by Cecilia and Jane to the deed No. 2,110, or there was a valid acceptance on their behalf by other persons which was effective for them personally but not an effective acceptance for the benefit of the issue either as a matter of construction because it was not expressly given for the benefit of the issue, or as a matter of law because there is no rule of law which made it available for the benefit of the issue. If there is a valid fidei-commissum and if the parties ask the court to, and it does, make an order on that basis, then no doubt section 8 operates; but it is submitted that in this case they went to the court on a quite different basis—that there was not a valid fidei-commissum enuring for the benefit of the issue. [*Abeywardene* v. *Tyrell*[47] was referred to.] The Perezian doctrine has never been held to apply to a case where the donee acceptance is one given on behalf of the donee by someone else. It is possible for a donee to say that he only accepts for himself. If a consent judgment is made on a mistaken view of the law and the facts, no doubt proceedings can be taken to have it set aside, but until that is done it stands and is effective as regards the parties and persons acquiring rights under it: Kerr on Fraud and Mistake, 7th ed. (1952), p. 420; *Huddersfield Banking Co. Ltd.* v. *Henry Lister & Son Ltd.*[48] Before section 8 applies, the judge's implied finding that there is not a fidei-commissum has to be got rid of. Admittedly, if there is a fidei-commissum the only question is how far down the chain it went.

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[44] (1916) 19 N.L.R. 90, 95.

[45] (1942) 43 N.L.R. 387.

[46] (1921) 22 N.L.R. 385, 391–392.

[47] 39 N.L.R. 505, 511.

To see whether the rule in Perezius applies to the gift in deed No. 2,110 the rule must be formulated, and in the words of Perezius it is that it must be for the benefit of the family, and, secondly, the donor must wish the subject-matter of the gift to remain in the family. [Reference was made to Lee's Introduction to Roman-Dutch Law, 5th ed., p. 14, and to the statement by Voet in Bk. 36, Tit. I, para. 27.] There is such a thing in Roman-Dutch law as a gift to a family eo nomine. There is a distinction—and an important one in Roman-Dutch law—between a gift for the family simpliciter and a gift for the benefit of the family coupled with an indication of an intention that the gift shall remain in the family. The conclusion from Sande's Treatise on Restraints on Alienation (Webber's translation), pp. 218–219, 225, from which Basnayake J. cited the right passages, is that that judge has quite soundly based himself on the conception and the authority of the Roman-Dutch law and his reasoning is correct. It is consistent and leads to the conclusion that this was not a gift in favorem familiae. The same submission is made on the construction of the document. It may be reinforced by saying that if the intention of the donor is in doubt regard may be had to the manner in which the persons concerned have acted over a period of years: *Vansanden* v. *Mack.*[49] The donor did not intend that either The Priory or Sirinivasa should remain in the family.

On the authorities the question comes down to which of the two main cases, *Carolis*[50] or *Mudaliyar*,[51] is right. The better reasoning is unquestionably that of *Carolis*[52]; *Mudaliyar's* case[53] contains a completely fallacious piece of reasoning. There is no room for applying the Perezian rule in Ceylon—the basis of it has gone. The submissions against *Orlandini's* case[54] are (i) one of the relevant factors in it was registration, (ii) in its reasoning it is based in part at any rate on the absurdity argument, and is inconsistent with *Crookes's* case,[55] and (iii) it does not stand alone—there are cases in South Africa which are wider in scope: *Van Der Plank, N.O.* v. *Otto*[56]; *Inland Revenue Commissioners* v. *Estate Crewe*,[57] and *Ex parte Clarke*.[58] It was that line of authority which was followed in *Crookes's* case.[59] [Reference was also made to T. Nadaraja on Roman-Dutch Law of Fidei-commissa (1949 ed.), p. 44, note (*e*).]

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[48] [1895] 2 Ch. 273.

[49] (1895) 1 N.L.R. 311, 315–316.

[50] 45 N.L.R. 156.

[51] 47 N.L.R. 361.

[52] 45 N.L.R. 156.

[53] 47 N.L.R. 361, 370.

[Earl Jowitt indicated that the Board were of opinion that the gift of 1883 was validly accepted on behalf of Jane.]

Pritt Q.C. in reply. In *Mudaliyar's* case[60] it was said that *Perera* v. *Marikar*[61] was not a perpetual donation or even a multiplex. *De Silva's* case[62] cannot be any authority on the scope of the Perezian exception, which it does not mention at all. *Soysa* v. *Mohideen*[63] and *Abeyesinghe* v. *Perera*[64] are complete authority in favour of the appellant and were followed by many other cases establishing a long series of decisions which the Board is asked to follow. The doctrine of Perezius is put in this way, a fidei-commissum in favorem familiae attracts the exception and the acceptance of the fidei-commissary is not necessary. Fidei-commissa in favorem familiae are of two kinds, multiplex or unicum, and the Perezian exception applies to both: Voet, Bk. 36, Tit. I, paras. 27, 28. If the exception protects fidei-commissa in favorem familiae, and if such fidei-commissa include multiplex and unicum, the whole case for the appellant is established. [Reference was also made to Nadaraja's Roman-Dutch Law of Fidei-commissa (1949), pp. 45, 102, and to Burge on Colonial and Foreign Laws, vol. 2, p. 149.] A true reading of Sande also shows that a fidei-commissum in favorem familiae can be either multiplex or unicum. The cases are authority for the proposition that the exception is to have the wider construction for which the appellant submits. *Sopinona's* case[65] helps a little. *Crookes's* case[66] did not mention the cases of *Orlandini*[67] or *Orchison*,[68] which are in the appellant's favour. The overwhelming course of the case law and the textbooks favours the appellant. Against him are (i) Perezius, if one misunderstands him, (ii) the obiter dictum in *Crookes's* case,[69] and (iii) *Carolis* v. *Alwis*,[70] which must be treated as overruled.

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[54] S.A.L.R. [1931] O.P.D. 141.
[55] 1956 (1) S.A.L.R. 277.
[56] S.A.L.R. [1912] A.D. 327.
[57] S.A.L.R. [1943] A.D. 656.
[58] S.A.L.R. [1944] W.L.D. 71.
[59] 1956 (1) S.A.L.R. 277.
[60] 47 N.L.R. 361, 370.
[61] 6 S.C.C. 138.
[62] 7 N.L.R. 123.
[63] 17 N.L.R. 279.
[64] 18 N.L.R. 222.
[65] 30 N.L.R. 295.
[66] 1956 (1) S.A.L.R. 277.
[67] S.A.L.R. [1931] O.P.D. 141.
[68] [1951] 3 S.A.L.R. (T.P.D.) 550.

J. Stephenson continuing the reply. On the assumption that the appellant is right on the application of the Perezian exception, section 8 of the Ordinance of 1876 means what it says and stands guard to prevent the destruction of an existing and valid fidei-commissum. The consent order of June 18, 1896, is not on the face of it necessarily inconsistent with the preservation of the fidei-commissum under the imperative terms of section 8. The court should strain to make the judgment fit, if it is possible, with section 8. [*Mirando* v. *Coudert*[71] was referred to.] Reliance is strongly placed on the words of Basnayake J. in the Supreme Court[72]: ". . . where . . . an exchange is effected . . . the "property taken in exchange becomes subject to the fidei-com- "missum by operation of section 8 without more and the parties "effecting the exchange cannot escape that consequence by "executing the deeds in such a way as to avoid a fidei-commissum "in respect of the land taken in exchange." The same view on the operation of section 8 was taken in *Abeywardene's* case.[73]

[Counsel was stopped while arguing the bona fide purchaser for value point.]

That leaves the partition point. The respondent's case was that the deed of partition was invalid. The point was raised in the respondent's printed case. If it is a point of law, it is open; if of evidence, it is not. There is no trace of it in the judgment below; one cannot spell it out of the issues by themselves, and it is submitted that the point cannot now be taken. [*Rodrigo* v. *Perera*[74] and *Abdul Cader* v. *Habibu Umma*[75] were referred to.]

1957. Jan. 14. The judgment of their Lordships was delivered by LORD KEITH OF AVONHOLM, who stated the facts set out above and continued: On these facts a number of difficult and important questions have been argued before the Board. No question of registration arises in the case. The appellant's case is based on the acceptance by Jane, his mother, of the gift of 1883, which acceptance, he says, enured to the benefit of himself and his deceased brothers as fidei-commissaries under the deed of gift. Both Jane and Cecilia were minors in 1883 and

[69] 1956 (1) S.A.L.R. 277.
[70] 45 N.L.R. 156.
[71] 19 N.L.R. 90, 93.
[72] (1951) 53 N.L.R. 217, 228.
[73] 39 N.L.R. 505, 512–513.
[74] (1923) 24 N.L.R. 420, 423.
[75] (1926) 28 N.L.R. 92.

acceptance was made on their behalf by Cooray and their brothers Alfred and James. Cooray, as appears from the evidence in the case, was Jane's brother-in-law, married to her sister Isabella. The deed was executed before a notary who attested that he knew all the parties. Their Lordships see no reason to think that this was not a valid acceptance on behalf of Cecilia and Jane. Their natural guardians, their father and their mother, could not accept for them, because they were the donors. In similar circumstances acceptance on behalf of a minor donee by his grandmother (who was the other donee) was held good in *Francesco* v. *Costa and Others*,[1] as was also acceptance by a brother on behalf of his minor brother in *Lewishamy* v. *De Silva*.[2] One of the grounds of judgment in these cases was that the donors had allowed such acceptances to be made on behalf of their minor children. Forms to be found in the Appendix to Raj Chandra's book on Fidei-Commissa disclose similar acceptances. The Supreme Court and the District Judge held that, in any event, the daughters had ratified the acceptance on their behalf by their subsequent conduct. Their Lordships do not feel called on to consider this point. In the circumstances of this case they consider that acceptance on their behalf by three of their nearest male relatives, other than their father, was sufficient acceptance of the gift to them.

There remains, however, the question whether the acceptance by Jane and Cecilia (the fiduciaries), was an acceptance for their children the fidei-commissaries. This is one of the major issues between the parties. If there was no acceptance for the fidei-commissaries the gift to them was revocable in the lifetime of the donors at any time before their acceptance, and there is no doubt that the conduct of the donors and the fiduciaries in the various transactions already mentioned would amount to such revocation. The District Judge held on earlier authority in Ceylon that acceptance by Jane was acceptance for her issue. The Supreme Court, on a review largely of passages from commentators on Roman-Dutch law, held that there was no acceptance for the fidei-commissaries.

Their Lordships would observe that the learned jurists of the 16th and 17th centuries were far from united in their opinions on various points arising with reference to donation and fidei-commissa and this left much scope for the consolidation of debatable points by legal decision. Their Lordships also accept as a correct approach in considering the authority of the early

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[1] (1889) 48 S.C.C. 189.

[2] (1906) 3 Bal. 43.

Dutch jurists the following passage from Professor Lee's Introduction to Roman-Dutch Law (4th ed., p. 15): "The "works of the older writers, on the contrary, have a weight "comparable to that of the decisions of the courts, or of the "limited number of 'books of authority' in English law. They "are authentic statements of the law itself, and, as such, hold "their ground until shown to be wrong. Of course the opinions "of these writers are often at variance amongst themselves or "bear an archaic stamp. In such event the courts will adopt "the view which is best supported by authority or most "consonant with reason; or will decline to follow any, if all the "competing doctrines seem to be out of harmony with the "conditions of modern life; or, again, will take a rule of the old "law, and explain or modify it in the sense demanded by "convenience."

On the question of acceptance for or by a fidei-commissary reference was made in the Supreme Court and before their Lordships to Perezius's Praelectiones (1653), Bk. VIII, Tit. LV, §§ 7 to 12. This learned commentator opens paragraph 7 thus: "The greater dispute is whether a donor who has gifted property "to another with this pact and limitation that after a certain "time he should restore it to some third person can in the "meantime revoke this pact." He proceeds to point out that there was a divergence of opinion on whether the third party needed to accept to prevent revocation by the donor, the majority view being that no acceptance was necessary. In subsequent paragraphs he considers special cases of events happening before the date of restoration, viz., acceptance by a notary for the third party, death of the donee, delivery by the donee of the subject of gift to the third party, death of the donor, confirmation of the gift by the donor's oath. He then comes to another case which he deals with in paragraph 12. The following is a translation of the relevant portion of this paragraph:—

"Lastly the former opinion [by which Perezius means the "opinion of the majority stated in paragraph 7] would be the "more correct if the gift made to one person is made in favour "of a family in which the donor wishes the property gifted to "remain; for by no pact can it be revoked in respect of after-"comers; for it is sufficient in order that it may be considered "a perpetual donation that the first donee has accepted it so that "there is no need of a subsequent acceptance where the burden "imposed on a first donee results in an action available to all "as Molina says (de Hisp. primog. L.4 c.2 n.75) because it "would be absurd, in order to make a fideicommissum irrevocable, to require the acceptance of infants and persons not yet "born; so that as the gift cannot be revoked in respect of these "it follows that the same thing must be said with regard to "those who precede them lest property left to the family should "go to more remote relations to the exclusion of closer ones. "See Anton Gomez in L.40 Tauri n.34: also Molina (d.loco) "who say that it has thus been decided at the present day by "the laws of the King of Spain, especially L.44 Tauri where "delivery alone made to the one first called to the succession of "the Majorate has the effect of making the Majorate itself "absolutely irrevocable both in respect of himself and also of "after-comers."

Of this passage their Lordships would observe that the writer speaks of a "perpetual donation" not of a perpetual fideicommissum. "Satis enim est ut censeatur donatio perpetua "quod primus eam acceptaverit, ulteriore acceptatione opus non "sit." In its context their Lordships think it clear that perpetual donation here means an irrevocable donation.

Their Lordships have not had their attention directed to any other commentary of the early writers which deals with this matter as fully as Perezius has done. Basnayake J. in the Supreme Court quotes certain passages from Van Leeuwen's Censura Forensis (1662) and Pothier's Law of Obligations (1761). Van Leeuwen does not appear, however, to be dealing with fidei-commissa, but with donations generally, and, indeed, would seem to exclude fidei-commissa as appears from the following passage (iv.12.18): "But there is a doubt whether a gift can be "conferred on anyone through an intermediate person, as it "verges on a fidei-commissum, which cannot be created by gift "or other disposition inter vivos, nor can it hold good." This view that a fidei-commissum cannot be created by gift inter vivos, if at one time doubtful, does not now prevail in Roman-Dutch law. But the passage would seem to exclude Van Leeuwen as an authority on the problem with which their Lordships are concerned. Pothier was not, of course, an authority on Roman-Dutch law. He did not accept the doctrine of jus quaesitum tertio, but he did recognize gifts made sub conditione or sub modo. In this connexion he poses the question (Law of Obligations, Evans translation, Vol. 1, p. 43): "Hence arises "another question, whether after giving you any thing with the "charge of restoring it to a third person in a certain time, or of "giving him some other thing, I can release you from the "charge without the intervention of such person, who was no "party to the act, and who has not accepted the liberality which "I exercised in his favour."

Here again, as did Perezius, he sets out the two conflicting views of learned writers on this question without arriving at any conclusion. Their Lordships are then left in the position that, so far as has been shown, there is nothing in the older writers more definite than the passage quoted from Perezius.

In connexion with this passage from Perezius there was canvassed before this Board—a matter which entered into the ratio of the judgment of the Supreme Court—whether the gift in the present case is a gift made in favour of the family, "si donatio concernat favorem familiae." The view of the Supreme Court was that it was not a gift in favour of the family because it came to an end with the first generation of fidei-commissaries, that is, with Jane's children, who were free to dispose of the property as they wished. What the court required was a fidei-commissum enduring indefinitely from generation to generation, in other words, a perpetual fidei-commissum. Reliance for this view was placed particularly on certain passages in Sande's Treatise on Restraints on Alienation (1633) (Webber's translation). Their Lordships are unable to draw the same conclusion from the passages in question when taken in their context with other passages. The material passages are to be found in Part III, Chapter V, of the treatise, and their Lordships will quote more fully from this chapter than was done in the Supreme Court. Chapter V is headed "What fidei-commissum "is induced from this prohibition upon alienation." The writer first considers two types of fidei-commissum which he calls conditional and simple or absolute. Broadly, the distinction is between a prohibition of alienation outside the family (conditional) and a direct bequest such as "I leave my landed property to the "family" coupled with a prohibition against alienation (simple and absolute). It is to be observed that the writer is speaking of testamentary dispositions and not of gifts inter vivos, but that would not appear to be material. The importance of the distinction was in the results that might follow, and Sande discusses these very fully. Sande clearly favours restricting restraints on alienation as much as possible. In paragraph 10 he says: "And in case of doubt a testator should not be considered to "burden his descendants with the perpetual and indefinite fide-"commissum, by a prohibition restraining the heir from "alienating. And a substitution made in favour of a family, "of descendants, or of several persons under a collective name, "takes place in the highest grade which survives at the time "when the condition arises, and it is not extended to the lower "grades unless the testator has expressly so willed."

He returns to this point in paragraph 11: "But the point we "are discussing is not in what order succession to a fidei-"commissum to a family takes place, but whether a testator, "by a simple prohibition against alienation outside the family, "wishes to induce a perpetual fideicommissum among the "members of the family, and to make this apply to many, so "that one after another, and so on, as long as a single member "of the family survives, is considered to be burdened by fidei-"commissary substitution. We say it is not so, because in cases "of doubt a direct substitution rather than an oblique and fidei-"commissary one is presumed."

Sande elaborates the matter further in paragraphs 13, 14 and 15 which, to preserve the context their Lordships quote in full:

"13. The argument which the supporters of the opposite view "take up is very weak. They say, since persons of different "grades are described under a collective term, and since they "therefore cannot be admitted to the inheritance all at the same "time, but must succeed in the order of succession, one after "the other, that the term must have some extended meaning. "This is quite true; but the extension is one not of time but of "grades, so that many grades are called to the fideicommissum, "which, however, rest only in the first grade of those who are "admitted, and is not extended from that to lower grades; and "thus many grades may be called, but only one can be said to "be admitted.

"14. Since this is what takes place when a fideicommissum is "expressly bequeathed to a family, it would much rather take "place in a tacit fideicommissum, which is induced by interpreta-"tion from a prohibition against alienation outside the family, "for otherwise a tacit fideicommissum would induce a greater "multitude of fideicommissa than an express one. Therefore a "fideicommissum which is implied from a prohibition upon "alienation is binding only on one person (unicum), and there-"fore if he, who has succeeded by virtue of such tacit fideicom-"missum to the estate on account of alienation which has been "made by another, afterwards alienates the same estate to a "stranger he would do so with impunity.

"15. This is so except where it can be gathered from the "words of the will itself that the intention of the testator was

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" otherwise; for example, if wishing to provide for the preservation of his family, he says, ' I will, or I order, that the landed ' property be retained, remain and be left in the family, so ' that it may never go out of the family.' For from these words " would be induced a real, multiplex and perpetual fideicommissum, which would last as long as any one of the family " survived. And therefore, even although the landed property " has once been left in the family, yet it would be against the " will of the testator that it should at any time thereafter go out " of the family."

Sande concludes Chapter V with the passage: " The truer " view is that when the testator wills that his goods remain in " his family and his name in perpetuo, then the fideicommissum " is never closed but is indefinitely extended."

Consideration of the effect of prohibitions of alienation in favour of a family will be found in others of the early commentators. Their Lordships would quote only one passage from Voet's Commentaries on the Pandects (1698–1704), dealing with Fidei Commissa (Macgregor's translation) XXXVI.1.28: " Where " a fideicommissum is left to a family the nature and effect of " such a bequest is not the same in every case. For the bequest " may be of such a kind that the fideicommissum is a single one; " and, where it has operated once, or where there has been one " restitution to the family, the fideicommissary obligation is determined; nor is the person who by virtue of such a restitution to " the family has acquired the property or the inheritance obliged " after his death to restore it to another member of the same " family, but he is able to transfer it to a stranger by act inter " vivos or by last will. But on the other hand, it may be a " recurring (multiplex) fideicommissum, circulating as it were " throughout the family, with the result that the person to whom " in the first instance restitution has been made as being one of " the family is bound to restore the inheritance to another " member of the family, and he again to a third member, and " so on, so long as there are members of the same family " surviving."

Their Lordships are unable to extract from these passages that a fidei-commissum in favour of the family is confined to a fidei-commissum which goes on from generation to generation. The writers seem to contemplate a fidei-commissum which comes to an end with the first generation as being a fidei-commissum in favour of the family. The question whether it is perpetual or not will depend on the language used by the testator, or donor. Nor can their Lordships see any reason why it should be so limited. When the gift in this case was made Jane was a child. It would be impossible for any issue of hers to accept for very many years. The reason given by Perezius that " it would be absurd, in order " to make a fidei commissum irrevocable, to require the accept- " ance of infants and persons not yet born " is as valid in the case of her children as it would be in the case of children to come into existence in a perpetual fidei-commissum. No doubt the same could be said of a fidei-commissum to stranger beneficiaries yet unborn. But a donation in favour of the family is an exception and the presumption of acceptance by a parent fiduciary for his immediate descendants is as valid as the presumption of acceptance for descendants to the third or fourth generation.

The great weight of authority derived from legal decision in Ceylon until the decision in the present case supports that view. In a matter in which so much was left open by the early commentators their Lordships attach great weight to a current of legal decision in a country in which fidei-commissa are extensively resorted to by its inhabitants, are part of its law and become frequent subject of consideration by its courts. The earliest authority to which their Lordships were referred is the case of *Perera* v. *Marikar*.[3] The facts and judgment are concisely set out in the headnote: " A father conveyed certain houses by post- " nuptial settlement to his married daughter, subject to the " condition that she should enjoy the same for her life with " restraint on anticipation or incumbrance, and that after her " death they should be enjoyed by her heirs and descendants in " perpetuity. The daughter accepted this gift. Afterwards, the " daughter having as yet no issue, the father made a will by which " he devised the same houses to the daughter absolutely, and " died, and his executor executed a conveyance of the houses in " favour of the daughter, her heirs, executors and her assigns for " ever. After the father's death a son, the plaintiff, was born to " the daughter:—

" *Held*, (*dissentiente* Burnside C.J.), affirming the decision of " the District Court, that the plaintiff, when he came into esse " had an interest in the houses, which could not be defeated by " any act of the testator subsequent to the settlement, and con- " sequently that plaintiff, on establishing that he was the son of " the settlor's daughter, was entitled to recover the houses in " ejectment from defendant, who claimed through a person to

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[3] (1884) 6 S.C.C. 138.

"whom the daughter had conveyed the houses after the "executor's conveyance to her."

The judgment of the majority of the court (Clarence and Dias JJ.) was delivered by Clarence J. He refers to Voet and Perezius and quotes from the passage in Perezius already quoted by their Lordships. He then proceeds: "I find, therefore, the Roman-"Dutch jurists, so far as their hypothetical reasoning or imaginary "cases go, favouring what seems to me the common-sense view, "that where a voluntary family settlement is made, by which "somebody benefits immediately and other classes contingently "on their being born and living to inherit, the settlement takes "effect in favour of these future classes immediately on its "taking effect, qua the immediate participator; and for these "reasons I think that the decision of the learned district judge "in upholding the plaintiff's demurrer must be affirmed."

It has been said in a later case (*Mudaliyar Wijetunga* v. *Duwalage Rossie*[4]) that *Perera* v. *Marikar*[5] was not a case of a perpetual fidei-commissum but a fidei-commissum unicum. But the point, in their Lordships' view, is immaterial as the ratio of the judgment in the passage quoted from Clarence J. is not, in their Lordships' view, dependent on the character of the fidei-commissum so long as it is in favour of a family. The decision was a decision of the Full Court. It has been followed in a series of cases which their Lordships find it unnecessary to examine at length. None, so far as their Lordships have noted, was a case of a perpetual, or multiplex, fidei-commissum. The cases constitute a very long train of authority.

In *Soysa* v. *Mohideen*[6] it was argued that the Perezius exception must be confined to the case of a familia which includes other people besides children and descendants. De Sampayo A.J. said of this argument[7]: "But no such distinction is intended, "and the reasoning applies even more strongly to a fidei-"commissum in favour of a family in the narrower sense of a "man's own children and descendants. Perezius means to lay "down generally that acceptance by the immediate donee, who "is the head of the family, is valid acceptance on behalf of all "those who follow him, and that, then, the entire donation is "considered perpetua or at once complete in respect of all the "succeeding beneficiaries." In referring here to "descendants" the judge appears to mean children of the fiduciaries, because in that case the gift was to three nephews and a niece and their issue with a devolution over failing issue. In *Abeyesinghe* v. *Perera*,[8] where the fidei-commissum was clearly confined to the legitimate children of the fiduciary, Wood Renton C.J. regarded *Soysa* v. *Mohideen*[9] as a precedent and followed it. *Perera* v. *Marikar*[10] and *Soysa* v. *Mohideen*[11] were followed in *Ayamperumal* v. *Mecyan*,[12] *Fernando* v. *Alwis*,[13] *Wijetunga* v. *Rossie*[14] and *Vallipuram* v. *Gasperson*,[15] which were all cases where the fidei-commissary heirs were confined to children of the fiduciary donees. Reliance was placed by counsel for the respondent on decisions in a contrary sense in *De Silva* v. *Thomas Appu*[16] and *Carolis* v. *Alwis*.[17] In the latter case Soertsz J. found himself able to distinguish the case in hand from *Perera* v. *Marikar*[18] and *Soysa* v. *Mohideen*.[19] For the reasons already given, their Lordships think he was in error in thinking that the ratio of the decision in *Perera* v. *Marikar*[20] proceeded on the view that it was a perpetual fidei-commissum. He also seems to have been in error in thinking that *Perera* v. *Marikar*[20] was not a Full Court decision.

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[4] (1946) 47 N.L.R. 361, 370.

[5] 6 S.C.C. 138.

[6] (1914) 17 N.L.R. 279.

[7] Ibid. 284.

The same view has been taken in South Africa in a case which is indistinguishable on its facts from the present case and on grounds substantially the same as those which appealed to the judges of the Ceylon courts who followed the precedent of *Perera* v. *Marikar*.[20] See *Ex parte Orlandini*.[21] Much stress, however, was placed by the respondent on a recent case in the Supreme Court of South Africa, *Crookes* v. *Watson*.[22] This was a case of an inter vivos trust, declared irrevocable, by which the settlor gifted certain shares to two trustees under trust to hold the same for the purposes, inter alia, of paying his daughter, on her attaining 25 years of age, the net income up to £1,000 per annum, to accumulate any balance of income and on the daughter's death to distribute the trust fund among her lawful issue equally, whom failing among her surviving brothers and the issue of any deceased brother and failing surviving brothers among her next-of-kin. The trustees were empowered to realize the shares and invest the proceeds. In the trust deed the trustees declared that they accepted the gifts in trust and the trust mentioned. After the daughter had reached the age of 25 years the settlor proposed to amend the trust deed to the effect of paying her £5,000 out of the trust fund and paying her the whole of the net income. The daughter's husband and her brothers consented for themselves and as guardians of their minor children. A curator ad litem was appointed to represent unborn issue and other unascertainable beneficiaries. The decision of the majority of the court (Centlivres C.J., Van den Heever J.A. and Steyn J.A., *diss.* Schreiner J.A. and Fagan J.A.) was that the ultimate beneficiaries acquired no rights under such a trust until they accepted and that the trust was revocable till accepted. It would appear that the daughter was regarded as having accepted the benefit conferred on her. The court below had held that the trust was "a contract for the benefit of third parties having the effect of a "fidei-commissum" and that "in the case of the settlement of "property in a family the acceptance of the first donee enures for "the benefit of and is considered an acceptance by all the "donees." One member of the lower court was prepared to support the judgment also on an additional ground which seems to have appealed to the minority in the Appellate Division, but which it is not material to notice here. The English law of trusts, it should be noted, does not prevail in South Africa, and an inter vivos trust appears to be regarded as a contract entered into between the settlor and the trustees for the benefit of third parties which in general may be revocable before acceptance by the third parties. The court dealt, inter alia, with the question whether what was called the Perezius exception applied to exclude the general rule that acceptance was necessary. For various reasons the Appellate Division held it did not. The shares were not gifted to the daughter but to the ultimate beneficiaries who took them free of any fidei-commissum. The daughter took only the income up to £1,000 per annum and her acceptance of that could not be regarded as an acceptance by her of the corpus on behalf of the ultimate beneficiaries. The shares might be sold and so it could not be said that they came within the conception of Perezius and other authorities of a family settlement by which "the subject-matter of the donation is inalienable and must "remain intact." Their Lordships are unable to find in the judgments of the majority any clear indication that in their view the Perezius exception is confined to the case of a perpetual fidei-commissum in favour of the family. Van den Heever J.A.[23] would appear to come nearest to that view. Centlivres C.J.[24]

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[8] (1915) 18 N.L.R. 222.
[9] 17 N.L.R. 279.
[10] 6 S.C.C. 138.
[11] 17 N.L.R. 279.
[12] (1917) 4 C.W.R. 182.
[13] (1935) 37 N.L.R. 201, 226.
[14] 47 N.L.R. 361.
[15] (1950) 52 N.L.R. 169.
[16] (1903) 7 N.L.R. 123.
[17] (1944) 45 N.L.R. 156.
[18] 6 S.C.C. 138.
[19] 17 N.L.R. 279.
[20] 6 S.C.C. 138.
[21] S.A.L.R. [1931] O.P.D. 141.
[22] 1956 (1) S.A.L.R. 277.

[23] 1956 (1) S.A.L.R. 277, 296.

[24] Ibid. 289.

merely says: "In other words, where there is a settlement in "favour of a family and the first member of the family accepts, "his acceptance enures for the benefit of all succeeding members "of the family." It appears to their Lordships that the ratio of the judgment did not require any consideration of whether the Perezius exception was confined to a perpetual fidei-commissum. The judgment did not bear to overrule the earlier case of *Orlandini*[25] where it was not so limited. Their Lordships are unable to take the view that the decision is in conflict with the long tract of decision in Ceylon which, in any event, their Lordships think for the reasons stated should prevail.

If there was an irrevocable fidei-commissum of "The "Priory" in favour of Jane's children by virtue of the gift and acceptance of 1883, the next question is whether that applies to "Sirinivasa" as a result of the proceedings that took place in 1896, when "The Priory" was exchanged for "Sirinivasa." Basnayake J. in the Supreme Court took the view that these proceedings were not initiated by the proper parties, but this view was not supported by counsel for the respondent before the Board. Their Lordships would only observe that they fail to understand why Siman as a person entitled to the possession and receipts of the rents and profits of "The Priory" as usufructuary should not come under the express language of section 5 of the Entail and Settlement Ordinance, 1876, as a person entitled to petition the court, and in any event the fiduciaries, Cecilia and Jane, were consenting parties to the order made.

A more important question is what was the effect of the order of the court. It directed, in accordance with the terms of the application that "the first and second respondents [Cecilia "and Jane] shall not sell, mortgage or otherwise alienate the "said premises except with the consent of the petitioners "[Siman and Maria] or the survivor of them." No reference was made, as in the original gift, to the premises devolving after the death of Cecilia and Jane on their respective issue. Their Lordships would refer here to the provisions of sections 4, 7 and 8 of the Ordinance of 1876, so far as relevant. These are as follows: "4. Whenever any immovable property is now or shall "hereafter be held under or subject to any entail, fidei commis-"sum, or settlement, whereby the alienation of such property "is prohibited or in any way restricted, it shall be lawful for "the District Court of the district, in which such property is "situate, if it shall deem it proper and consistent with a due

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[25] S.A.L.R. [1931] O.P.D. 141.

" regard for the interests of all parties entitled under such entail, " fidei commissum, or settlement, and subject to the provisions " and restrictions hereinafter contained, from time to time to " authorize a lease, exchange, or sale of the whole or any part " or parts of such property, upon such terms and subject to such " conditions as the said court shall deem expedient. . . .

" 7. All money received under or by virtue of any sale effected " under the authority of this Ordinance shall be applied, as the " District Court shall from time to time direct, to some one or " more of the following purposes (that is to say):—(*a*) the discharge or redemption of any charge or incumbrance affecting " the property, or affecting any other property, subject to the " same entail, fidei commissum, or settlement; or (*b*) the purchase of other immovable property to be settled in the same " manner as the property in respect of which the money was " paid; or (*c*) investments in the Loan Board or in Government " securities, the interest thereof being made payable to the party " for the time being otherwise entitled to the rents and profits " of the land sold; or (*d*) the payment to any person becoming " absolutely entitled.

" 8. Any property taken in exchange for any property " exchanged under the provisions of this Ordinance shall become " subject to the same entail, fidei commissum, or settlement, as " the property for which it was given in exchange was subject to " at the time of such exchange."

In their Lordships' view it is clear from these provisions that the purpose and intendment of the Ordinance was to preserve in the event of any sale or exchange of premises subject to a fidei-commissum the terms of the fidei-commissum and to apply these to the land taken in exchange or to the price of the premises sold which was to be treated as a surrogatum of the original gift. In the present case it is section 8 that applies and, in their Lordships' opinion, " Sirinivasa " when received in exchange for " The Priory " must be taken to have been held in terms of the original fidei-commissum. This was the view also of the District Judge and of Basnayake J. in the Supreme Court. It was argued for the respondent that the prohibition on alienation imposed on the fiduciaries except with the consent of their parents was a relaxation of the absolute prohibition imposed in the original gift and so defeated the fidei-commissum, but for the reasons already given this would be contrary to the terms of the Ordinance, and if such is the construction of the order the terms of the Ordinance, in their Lordships' view, must prevail. But, in their

Lordships' opinion, the better view is that the order affected only the powers of the fiduciaries in respect of their own rights and interests in the land in question and it may be that, as they consented to the order, it was competent to modify the terms of the original gift in this respect. But that could not affect the rights of the fidei-commissaries.

It was argued that on the law as it was understood in 1896 there was no acceptance binding the donors and the fiduciaries in a question with the fidei-commissaries then unborn, and that it was open to the donors and the donees and the court to alter the terms of the original gift to the effect of cutting out, or revoking the gift to, the fidei-commissaries. Their Lordships are unable to hold, as already indicated, that this was understood to be the law in 1896 or that the court in 1896 gave any consideration to the question. But, in any event, the effect of the Ordinance of 1876 was to write the terms of the original fidei-commissum into the substituted gift and the consequences of what was done in 1883 must be considered today when the fidei-commissaries make their claim and not in 1896 when there was none in existence.

It was further argued that the respondent, or her father who purchased the property, need not look further back in the chain of title than the order of the court in 1896 and was entitled to rely on the terms of that order. Their Lordships are unable to assent to that argument in view of the imperative terms of section 8 of the Ordinance. Reference was made to the case of *Mirando* v. *Coudert* [26] in support of the respondent's contention. In their Lordships' view that case has no application to the circumstances here. That was a case where property had been sold many years previously under the Ordinance No. 11 of 1876. There were some irregularities in the procedure when the property was ordered to be sold and the court apparently thought that it had been subject to a fidei-commissum. But the result was that until set aside the order could be regarded as a sale under section 7 of the Ordinance which would discharge the property of the fidei-commissum. The purchaser was held to have acquired a free and absolute title unless the whole proceedings were rescinded. Their Lordships see no reason to doubt the soundness of that decision. The ratio of this decision would apply, in their Lordships' opinion, to "The Priory" which was exchanged free of any fidei-commissum for "Sirinivasa," but it could not affect " Sirinivasa " which was taken under burden of the fidei-commissum.

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[26] (1916) 19 N.L.R. 90.

It was said also that the respondent's father was protected as being a bona fide purchaser without any notice of a defect in his title. Their Lordships are prepared to assume that the respondent's father was such a purchaser. But this cannot avail the respondent. Fidei-commissa have long been recognized in the law of Ceylon and, apart from any question of prescription, or of prior registration in a case where a conveyance has been obtained from a fiduciary who may be taken to hold on an alternative title of intestacy, they have been held to prevail against a bona fide purchaser. A fiduciary, though vested in the dominium of the property gifted, has that dominium only during his life and cannot convey more than he enjoyed. On his death, or other event, the fidei-commissary becomes the owner of the property. The doctrines of English law have no play in this sphere. This has already been recognized by this Board in the case of *Abdul Hameed Sitti Kadija* v. *De Saram*.[27]

The remaining point in the appeal concerns the partition of " Sirinivasa " which took place between Jane and her father in 1900. When Cecilia conveyed to Siman her undivided moiety of " Sirinivasa " on June 23, 1896, she parted with the dominium and, in their Lordships' opinion, with all her rights and interest in the property. So long as she held her undivided share she could have made a partition agreement with her sister Jane, and it is conceded that in such an event the fidei-commissum would have attached to each of the divided portions for the benefit of Jane's issue and Cecilia's issue respectively. See *Abdul Cader* v. *Habibu Umma*.[28] In their Lordships' opinion Siman stood in Cecilia's shoes and was entitled to make a partition agreement with Jane. He was a co-owner with Jane and had all the rights of a co-owner so long as Cecilia was alive, otherwise there was no one who could effect a partition with Jane. This was the view taken by the District Judge. It was suggested that there was no evidence that Cecilia was alive when the partition was made. But it is clear from the proceedings in the courts below that it was the common assumption that Cecilia was alive and the District Judge held that the partition was good and binding on the fidei-commissaries on that assumption. The Supreme Court did not have to deal with the question of partition on the view that it took of the question of acceptance. But it is clear that no point was taken for the respondent on appeal to the Supreme

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[27] [1946] A.C. 208.

[28] (1926) 28 N.L.R. 92.

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Court touching the question of Cecilia's being dead. Nor is the point taken in the respondent's case on appeal to this Board. The inference is that it was well known that Cecilia was alive at the date of the partition. But on any view their Lordships would not be prepared to allow the point to be taken now.

For these reasons their Lordships will humbly advise Her Majesty to allow the appeal, to set aside the judgment and decree of the Supreme Court and to restore the judgment and decree of the District Court. The respondent must pay the costs of the appeal to this Board and of the appeal to the Supreme Court of Ceylon.

Solicitors: *Darley, Cumberland & Co.; Lee & Pembertons.*

C. C.

J. C.*

1956
Dec. 11.
1957
Jan. 15.

ALFRED GRANVILLE ROSS . . . . APPELLANT;

AND

THE QUEEN . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

Eastern Africa — Kenya — Criminal law — Eastern African Court of Appeal—Jurisdiction to order retrial—Same power as that of court appealed from — General jurisdiction — Rule of practice and procedure — East African Court of Appeal Order in Council, 1950 (*S.I.* 1950, *No.* 1968), *ss.* 16 (1), 18 (1)—*Eastern African Court of Appeal Rules,* 1954, *r.* 41.
Criminal Law—Appeal. "Practice and procedure."

The Court of Appeal for Eastern Africa has jurisdiction to order a new trial in a criminal case on appeal from the Supreme Court of Kenya. That jurisdiction is conferred by section 16 (1) of the East African Court of Appeal Order in Council, 1950, which provides that the court shall have the "jurisdiction vested in the "court from which the appeal is brought," for under section 354 of the Criminal Procedure Code of Kenya the Supreme Court has the power of ordering a retrial.

Further, the East African Court of Appeal has a general jurisdiction to order retrials in criminal cases in appeals from the courts of all the territories to which the Order in Council of 1950 applies, for rule 41 of the Eastern African Court of Appeal Rules, 1954, giving the court power to "order a retrial" in a criminal case, is within the power of the judges under section 18 (1) of the Order in Council of 1950 to make rules for "regulating the "practice and procedure" in appeals to the court.

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* *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD COHEN, LORD KEITH OF AVONHOLM.

Judgment of the Court of Appeal for Eastern Africa affirmed.

Appeal (No. 12 of 1956), by special leave, from a judgment of the Court of Appeal for Eastern Africa (Worley P., Bacon J.A. and Corrie J.) (November 17, 1955), quashing the conviction of the appellant in the Supreme Court of Kenya (Windham J. and a jury) (July 14, 1955) of offences against the Income Tax and Excess Profits Ordinances, and ordering that he be retried.

The main question in this appeal was whether the Court of Appeal for Eastern Africa had jurisdiction to order a retrial in a criminal case. The East African Court of Appeal Order in Council, 1950, which established the present court, provided:

" Section 3. The Territories to which this Order applies are " Aden, Kenya, Seychelles, Somaliland, Tanganyika, Uganda and " Zanzibar."

" Section 4. His Majesty's Court of Appeal for Eastern Africa " (which was constituted under the Eastern African Court of " Appeal Orders in Council, 1921 to 1947) shall continue to be a " Court of Appeal for the courts of Aden, Kenya, Tanganyika, " Uganda and Zanzibar, and in addition shall be, and is hereby " constituted as, a Court of Appeal for the courts of Seychelles " and Somaliland. The court shall be a Superior Court of " Record."

" Section 16.—(1) The court shall have jurisdiction to hear and " determine such appeals from judgments of courts of the territories (including reserved questions of law and cases stated) and " to exercise such powers and authorities as may be prescribed by " or under any law for the time being in force in any of the " territories respectively, subject to the provisions of this Order " or of any such law; and, subject as aforesaid, for all purposes of " and incidental to the hearing and determination of any appeal " within its jurisdiction, the court shall have the power, authority " and jurisdiction vested in the court from which the appeal is " brought.

" (2) The process of the court shall run throughout the territories and any judgment of the court shall be executed and " enforced in like manner as if it were an original judgment of the " court from which the appeal is brought.

" (3) In the hearing of any appeal the law to be applied shall be " the law applicable to the case in the court from which the appeal " is brought."

" Section 18.—(1) Subject to the provisions of this Order, the " President and any two other judges of the court selected by " the President, may make Rules of Court for regulating the " practice and procedure (including that in any court from which " appeals are brought) in appeals to the court, whether before or " after final judgment in the court, including the right of audience " in the court and the legal representation of persons concerned, " the duties of the officers of the court, the costs of, and fees in " respect of, proceedings therein and any matters relating to the " matters aforesaid.

" (2) Rules of Court shall not take effect until they are " approved by a Secretary of State, and when so approved shall " have effect as if contained in this Order:

" Provided that, if it shall be certified in any Rules that it is " necessary that they should take effect before such approval can " be obtained, such Rules may be made to take effect accordingly; " in which case such Rules may be disallowed by a Secretary of " State (without prejudice to any thing lawfully done thereunder) " but shall continue to have effect unless and until they shall be so " disallowed and such disallowance shall be published by the court.

" (3) Except so far as they shall be amended, added to or " revoked by Rules of Court made under this Order, all Rules " of Court made under the Eastern African Court of Appeal " Orders in Council, 1921 to 1947, and in force at the commencement of this Order, shall remain in force, and for the " purposes of this Order shall be deemed to have been made " under this Order but shall be applied with any adaptations, " modifications or additions which the court or judge may consider " necessary or just in consequence of the provisions of this Order."

Under and by virtue of the authority contained in section 18 of the Order in Council Rules of Court were duly made by the President and judges of the court and approved by the Secretary of State on June 29, 1954.

Part III of such Rules was entitled " First Appeals in " Criminal Matters " and contained the following Rules:—

" Rule 24. This part of these Rules shall apply only to " appeals from a Superior Court acting in its original jurisdiction " in criminal cases and to matters related thereto."

" Rule 25. In any case not provided for by this part of these " Rules the practice and procedure for the time being of the " Court of Criminal Appeal in England shall be followed as nearly " as may be."

"Rule 41.—(1) At the hearing of an appeal the court shall "hear the appellant or his advocate, if he appears, and, if it "thinks fit, the respondent or his advocate, if he appears, and "may hear the appellant or his advocate in reply, and the court "may thereupon confirm, reverse or vary the decision of the "trial court, or may order a retrial or may remit the matter with "the opinion of the court thereon to the trial court, or may make "such other order in the matter as to it may seem just, and "may by such order exercise any power which the trial court "might have exercised:

"Provided that the court may, notwithstanding that it is of "opinion that the point or points raised in the appeal might "be decided in favour of the appellant, dismiss the appeal if it "considers that no substantial miscarriage of justice has occurred.

"(2) At the hearing of an appeal the court may, if it thinks "that a different sentence should have been passed, and whether "or not an appeal has been brought against sentence, quash the "sentence passed by the trial court and pass such other sentence "warranted in law (whether more or less severe) in substitution "therefor as it thinks ought to have been passed.

"(3) The court shall in no case make any order as to payment "of costs of any appeal governed by the provisions of this part "of these Rules to or by the appellant or respondent."

It may be noted that the appellate jurisdiction vested in the court related to both criminal and civil matters and a similar power of ordering a retrial in civil matters was conferred by Rule 76.

1956. Dec. 5, 6, 10, 11. *John Foster Q.C.* and *Mark Littman* for the appellant. There are two points, first, whether the Court of Appeal for Eastern Africa has jurisdiction to order a retrial in a criminal case, and secondly, if it has, whether the jurisdiction can be exercised so as to enable the prosecution to fill in important gaps in the evidence. In section 18 of the Order in Council of 1950 the rule-making power is "for regulating the practice and "procedure . . . in appeals to the court," and the first and main question is whether the right to order a retrial given by rule 41 of the Eastern African Court of Appeal Rules, 1954, made pursuant to section 18 of the Order in Council, is a matter of practice and procedure. It is submitted that it is not and that rule 41 was ultra vires. The Rules of Court made in 1925 under the Order in Council of 1921 did not contain any right to order a retrial, so that it looks as if the position just before 1954 was that there was no such power. The list of things which could be done under the rules of practice and procedure as envisaged in the Order in Council of 1950 is a very long way from giving the right to order a new trial, which, it is submitted, is a substantive right, because it affects the right of the accused to plead and of the court to convict or acquit.

It is a fundamental principle that no man shall be put a second time in peril on the same charge, and to grant a new trial is the negation of that right: *Winsor* v. *The Queen* [1]; Archbold's Criminal Pleading, Evidence and Practice, 31st ed., p. 135, quoting Hawkins' Pleas of the Crown, vol. 2, c. 35. It is a fundamental principle and, therefore, not apt to be described as a rule of practice and procedure. The appellant's conviction having been quashed, the right of ordering a new trial must deprive him of his plea of autrefois acquit, which is a fundamental right. There are authorities which lay down the proposition that a right of appeal is a substantive right and not a matter of practice and procedure; that is in a similar ambit to an order for a new trial: *Colonial Sugar Refining Co. Ltd.* v. *Irving* [2]; *Newman* v. *Klausner.*[3] *Attorney-General* v. *Sillem* [4] shows that where the statute gave the right to regulate the practice and mode of pleading, that did not include the creation of a right of appeal.

When the court orders a new trial it is in fact giving a right of appeal to the prosecution against its decision to quash the conviction—which amounts to an acquittal—and the court is creating a new jurisdiction. The approach historically to a criminal case was that there was no right of appeal, but there were certain methods of getting a new trial. There is no power to grant a new trial in criminal cases in the Court of Criminal Appeal Act, 1907, of the United Kingdom, and that has been regretted by the judges: *Rex* v. *Dyson.*[5] From the way the Order in Council of 1950 is drafted, if the intention was to confer jurisdiction on the Eastern African Court of Appeal to order a new trial the right way to do it would have been for the law of Kenya to provide for the grant of that jurisdiction to the Court of Appeal for Kenya, i.e., the Eastern African Court of Appeal.

Practice and procedure were alluded to in *Poyser* v. *Minors*,[6] which was cited with approval in *Lever Brothers Ltd.* v. *Kneale and Bagnall.*[7] [*Pellas (E.) & Co.* v. *Neptune Marine Insurance Co.*[8] was also referred to.] In criminal law the right not to be tried again when the Court of Appeal has quashed the conviction cannot be taken away by rules of practice and procedure. Further, to order a retrial, even if it were practice and procedure, is not practice and procedure " in the appeal " within section 18 of the Order in Council.

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[1] (1866) L.R. 1 Q.B. 390.

[2] [1905] A.C. 369, 372; 21 T.L.R. 513.

[3] [1922] 1 K.B. 228, 231; 38 T.L.R. 53.

[4] (1864) 10 H.L.C. 704, 723, 743.

[5] [1908] 2 K.B. 454; 24 T.L.R. 653.

[6] (1881) 7 Q.B.D. 329, 333.

Next, the respondent contends in its printed case that rule 41, having been approved by the Secretary of State, takes effect under section 18 (2) of the Order in Council as if contained in the Order, and is therefore not open to challenge in any court on the ground of ultra vires. It is not proposed to go deeply into that point, for if the right to order a new trial is not practice and procedure, then rule 41 purported to confer a jurisdiction which it is not in the power of the judges to bestow, and the approval by the Secretary of State would not validate that bestowed jurisdiction. [Reference was made to *Minister of Health* v. *The King (on the Prosecution of Yaffe)*[9] and *In re Fletcher.*[10]]

The next submission is that the power to grant a new trial is by no means inherent in the right " to hear and determine . . . " appeals " given by the opening words of section 16 (1) of the Order in Council: *Reg.* v. *Berger.*[11] With regard to the concluding words of section 16 (1), that " the court shall have " the power, authority and jurisdiction vested in the court from " which the appeal is brought," if the law of Kenya does provide for a retrial in this kind of case, then this appeal must fail. Section 354 of the Criminal Procedure Code (Laws of Kenya, 1948, c. 27) provides: " (1) The Supreme Court . . . may— " (*a*) in an appeal from a conviction—(i) reverse the finding and " sentence, and acquit or discharge the accused, or order him to " be tried by a court of competent jurisdiction . . ." That refers to appeals from subordinate courts, and the words " or order him " to be tried by a court of competent jurisdiction " do not come within the words at the end of section 16 (1) of the Order in Council. It appears to be common ground that the Supreme Court in its original jurisdiction cannot order a new trial. That the right to order a new trial is restricted by the laws of Kenya to appeals from convictions in subordinate courts shows that it does not apply to the Eastern African Court of Appeal when the Supreme Court has exercised its original jurisdiction to try a criminal case.

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[7] [1937] 2 K.B. 87, 93; 53 T.L.R. 661; [1937] 2 All E.R. 477.

[8] (1879) 5 C.P.D. 34, 41.

[9] [1931] A.C. 494, 520, 523; 47 T.L.R. 337.

[10] [1955] 3 W.L.R. 172; [1955] 2 All E.R. 592.

[11] [1894] 1 Q.B. 823; 10 T.L.R. 380.

B. MacKenna Q.C., *J. G. Le Quesne* and *D. C. Kennedy* for the Crown. The first submission is that the Court of Appeal has power to set aside the conviction appealed from and to order a retrial by virtue of the jurisdiction " to hear and determine . . . " appeals " given by section 16 (1) of the Order in Council. The court has made orders for retrials in criminal cases from its very inception in 1902 to the present time. The Order in Council of 1950 refers to both civil and criminal cases, and if it gives no power to order a retrial in criminal cases neither does it give the power in a civil case unless it can be shown that the jurisdiction to hear and determine appeals in civil cases imports a wider power than in a criminal case. There is no inherent reason for giving the jurisdiction to hear and determine a more restricted scope in the one case than the other.

With regard to the principle that a man cannot be put in peril twice on the same charge, until the passing of the Criminal Appeal Act, 1907, the Court of Queen's Bench undoubtedly had the power to order a retrial in the case of misdemeanors: Archbold's Criminal Pleading, Evidence and Practice, 18th ed. (1875), pp. 188, 196, 209; *Reg.* v. *Berger.*[12] If that be right, it becomes plain that the argument for the appellant gets no help from such passages in Hawkins' Pleas of the Crown as " a man " may not be put twice in peril for the same offence." That passage has no application whatever to the present class of case. *Rex* v. *Simpson*[13] is cited for the statement of Scrutton J. that if the acquittal is quashed there is nothing left; what has happened in the court below is washed out. Here the order quashing the conviction would have wiped out the whole effect of the first trial, and there is no objection to a retrial. If a judgment is set aside for any reason it is as though the judgment had not been given and the plea of autrefois convict is not available. [*Reg.* v. *Drury*[14] was referred to.] In England the special statutory provisions make a retrial impossible (section 4 (2) of the Act of 1907) except in special circumstances (section 20 (4)): *Crane* v. *Director of Public Prosecutions.*[15] There is no distinction between civil and criminal cases in respect of the application of the maxim nemo debet bis vexari. The power to hear and determine both in civil and criminal cases gives the court power to order a retrial. [*Bray* v. *Ford*[16] was also referred to.]

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[12] [1894] 1 Q.B. 823.

[13] [1914] 1 K.B. 66; 30 T.L.R. 31.

[14] (1849) 3 Car. & K. 193, 199.

[15] [1921] 2 A.C. 299.

The second consideration is that the Eastern African Court of Appeal from its inception has been ordering retrials in civil and criminal cases. The third consideration is that the Supreme Courts of the territories themselves have power to order retrials in the exercise of their own appellate jurisdiction in both civil and criminal cases. In the light of these considerations the submission is that where a reconstituted Court of Appeal is given jurisdiction to hear and determine appeals with no express exclusion of power to order a new trial, where a jurisdiction may be exercisable both in civil and in criminal cases and in cases tried with and without a jury, where the jurisdiction is to entertain appeals from territories where the power to order a retrial in a criminal case is well established, where the Court of Appeal as previously constituted had exercised the power to order a retrial in criminal cases for many years, the reconstituted Court of Appeal in these circumstances still has that power. No argument to the contrary can be based on the limited powers of the Court of Criminal Appeal in England; there is here nothing comparable to section 4 (2) of the Act of 1907. The power to hear a case given to the court carries with it a power to do everything before and after the hearing: *Green* v. *Lord Penzance*.[17]

Assuming that the submission that the jurisdiction " to hear " and determine " imports a power to order a new trial is wrong, then the next submission is that that power is conferred by rule 41 of the Rules of Court made under section 18 of the Order in Council of 1950. The power conferred by the Order in Council is, if anything, wider than that conferred by the earlier Orders in Council of 1902 and 1909. The submission is that a power to regulate an appellate court's practice and procedure includes the power to make a rule enabling the court to order a new trial. *Poyser* v. *Minors*[18] supports that contention. The Judicature Act has treated power to order a new trial as a matter of practice and procedure. Lush L.J. in *Poyser's* case[19] defined " practice " and procedure " as " the mode of proceeding by which a legal " right is enforced, as distinguished from the law which gives or " defines the right, and which by means of the proceeding the " court is to administer the machinery as distinguished from its " product." *Ex parte Wier*[20] is in line with what was said in

[16] [1896] A.C. 44, 49, 52; 12 T.L.R. 119.

[17] (1881) 6 App.Cas. 657, 669–670.

[18] 7 Q.B.D. 329.

[19] Ibid. 333.

[20] (1871) L.R. 6 Ch. 875, 879.

Poyser's case.[21] *Crane's* case[22] does not take the argument very far. It was said for the appellant that rule 41 would permit the Court of Appeal to order a retrial on a charge of murder where the defendant had been acquitted of murder but convicted of manslaughter but the conviction had been set aside: as to that, see *Kelly* v. *The King.*[23]

The third submission is that the Court of Appeal has power to order a retrial in this case by reason of the provision in section 16 (1) of the Order in Council giving it the power and authority of the Supreme Court of Kenya. The power of the Supreme Court in section 354 of the Criminal Procedure Code to order the accused person in an appeal from a conviction "to be tried by "a court of competent jurisdiction" includes the case of a retrial. It is well established in East Africa that under a section like section 354 the power to order a person to be tried by a competent court includes a case where the court has quashed his conviction and then thought that a retrial was the proper way of dealing with the case: *Rex* v. *Kamunan*[24]; *Zaver* v. *The King.*[25]

If all the first three submissions are wrong—and the matter is not covered by either the power "to hear and determine," or the rule-making power or the final words of section 16 (1)—the submission then is that under the authority of *Institute of Patent Agents* v. *Lockwood*[26] rule 41 is to be treated as if it were part of the Order in Council and its validity is not challengeable. It has been well established in modern times that a rule which is within the rule-making power will be treated as having the force of law. [Reference was made to *Creighton* v. *Wylie & Lochhead Ltd.*[27]; *Reg.* v. *Pharmaceutical Society of Ireland*[28]; *Mackey* v. *Monks*[29]; *Rex* v. *Minister of Health, Ex parte Yaffe*[30]; and to Sir William Graham Harrison's Notes on Derogation by Parliament of Legislative Powers, pp. 63–66.]

John Foster Q.C. in reply on the main point. If the Court of Appeal has the intrinsic right under the words "hear and "determine" to order a new trial, there would then be no necessity for any local law to confer jurisdiction in criminal cases, whereas one finds in the laws of Tanganyika and Uganda in criminal cases, and in the law of Kenya in civil cases, the right of ordering a new trial is specifically conferred on the Eastern

[21] 7 Q.B.D. 329.
[22] [1921] 2 A.C. 299.
[23] (1932) 32 C.L.R. 509, 516.
[24] (1935) 2 E.A.C.A. 122.
[25] (1952) 19 E.A.C.A. 244.
[26] [1894] A.C. 347; 10 T.L.R. 527.
[27] 1915 S.C. 305.
[28] [1899] 2 I.R. 132, 152.
[29] [1916] 2 I.R. 200, 258.
[30] [1930] 2 K.B. 98, 128–132; 46 T.L.R. 373.

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African Court of Appeal. "Hear and determine" could not give that right apart from a legislative provision in the territory from which the appeal is brought. It appears from *Crane's* case [31] that Lord Sumner regarded the right of a new trial, even in the case of nullity, not as a matter of practice and procedure; a fortiori, it is submitted, to order a retrial where there has been a conviction could not be a matter of procedure.

[After consultation, Viscount Simonds said that their Lordships were of opinion that the appellant failed on his first point. They did not think it necessary for the respondent to rely on the doctrine of *Lockwood's* case [32] to give the Court of Appeal for Eastern Africa jurisdiction to order a new trial.]

With regard to the second question—whether the jurisdiction can be exercised so as to enable the prosecution to fill in important gaps in the evidence—the short point is that the prosecution failed to prove all the facts necessary to warrant the conviction. A new trial should not be given to allow a gap in the evidence to be filled in. The principles on which a new trial has been granted under the Indian Code are applicable in Kenya; and it is said in Sohoni's Code of Criminal Procedure, 12th ed. (1927), p. 889: "A retrial should not be ordered to enable the prosecution to fill up gaps in the evidence." If there is no evidence, to order a retrial would be against natural justice. [Reference was made to *Zaver* v. *The King* [33]; *Promotha Nath Ray* v. *King-Emperor* [34]; *Jeremiah* v. *Vas* [35]; *Muhsin* v. *Mohamed*,[36] and *Rex* v. *Dossani*.[37]] In the case last cited the principle is stated as completely established: "It is not in question that a retrial should not be ordered for the purposes of allowing the prosecution to fill up the gaps in its case." *Rex* v. *Stoddart* [38] says that a right to direct a new trial should only rarely be exercised.

B. MacKenna Q.C. The power of the Court of Appeal to order a retrial is discretionary, and the questions are, first, whether the court exercised its discretion rightly or wrongly, and, secondly, whether this Board, which is not sitting as a court of criminal appeal, would interfere with the exercise on the ground that it might itself have reached a different conclusion. The appellant fails on both those points.

[He was stopped.]

Foster Q.C. replied.

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[31] [1921] 2 A.C. 299.

[32] [1894] A.C. 347.

[33] 19 E.A.C.A. 244.

[34] (1912) 17 C.W.N. 479, 485.

[35] I.L.R. 36 Mad. 457, 468.

[36] 17 E.A.C.A. 128.

[37] 13 E.A.C.A. 150, 151.

[38] (1909) 25 T.L.R. 612; 2 Cr.App. R. 217, 245.

1956. Dec. 11. Viscount Simonds announced that their Lordships would humbly advise Her Majesty that the appeal should be dismissed, and that they would give their reasons later.

1957. Jan. 15. Their Lordships' reasons for dismissing the appeal were delivered by Viscount Simonds. On July 14, 1955, the appellant was convicted in the Supreme Court of Kenya of offences against the Income Tax and Excess Profits Tax Ordinances of Kenya. He appealed to the Court of Appeal for Eastern Africa and that court on November 17, 1955, quashed the conviction but ordered him to be retried. From so much of this order as ordered him to be retried the appellant has by special leave appealed to Her Majesty in Council.

Two questions arise for decision, the first, one of general importance, whether the Court of Appeal for Eastern Africa has jurisdiction to order a new trial in a criminal case, the second, whether, if the court has such jurisdiction, it was so improperly exercised in this case as to justify their Lordships in advising Her Majesty that the order should be set aside.

Their Lordships will first deal with the question of jurisdiction. They regret that, as the point was not taken until the matter reached their Lordships' Board, they have not the benefit of the opinion of the Court of Appeal for Eastern Africa upon it, but as the jurisdiction has been exercised without challenge for more than 50 years during the whole of the existence of the present court and its predecessors they are glad to be able to come to the clear conclusion that there is no valid ground for questioning it.

The present court was established by the East African Court of Appeal Order in Council, 1950, which, after reciting (inter alia) that it was desirable that the East African Court of Appeal Orders in Council, 1921 to 1947, should be revoked and replaced by a new Order, ordered as follows:—[His Lordship stated the material terms of the Order in Council of 1950, and of the Rules of Court made under section 18 (1) thereof and continued:] The relevant sections of the Order in Council and the relevant rules having been stated, it is convenient to refer to the submissions of the appellant. The argument of counsel on his behalf assumed that apart from the power conferred by rule 41 the court had no jurisdiction to order a retrial in criminal matters. He contended that the only power to make Rules of Court under section 18 of the Order in Council is for the purpose of "regulating the "practice and procedure . . . in appeals to the court," that the conferring of a power to direct a retrial in a criminal case is not a matter of practice and procedure, that rule 41 so far as it purports to confer a power to order a new trial is ultra vires, and that so far as it is ultra vires the provision of section 18 (2) of the Order in Council must be disregarded.

On behalf of the respondent the primary assumption of the appellant was challenged and it was urged not only that rule 41 was intra vires and was in any case unimpeachable by virtue of section 18 (2) of the Order in Council, but also that section 16 of the Order in Council by itself gave the necessary jurisdiction. This contention was founded in the first place on the bare words "jurisdiction to hear and determine such appeals" which, it was said, empowered the court to make any order which might appear to it necessary for doing justice in the appeal, including in a proper case an order for a retrial. In the second place the last words of section 16 (1) were called in aid: the court was thereby given the power, authority and jurisdiction vested in the court from which the appeal was brought: the Supreme Court of Kenya, from which the instant appeal was brought, had under section 354 of the Criminal Procedure Code of Kenya power in an appeal from a conviction to reverse the finding and sentence and acquit or discharge the accused or order him to be tried by a court of competent jurisdiction or commit him for trial: a similar power, authority and jurisdiction thus vested in the Court of Appeal for Eastern Africa empowers that court to order a retrial in an appeal from a conviction.

So far as the present appeal is concerned the argument last stated appears to their Lordships to be conclusive. Section 354 of the Criminal Procedure Code of Kenya has been referred to. Section 378 of the same Code provides for an appeal to the Court of Appeal in Eastern Africa of a person convicted on a trial held by the Supreme Court of Kenya. It appears to be a logical and consistent scheme that the same power of ordering a retrial should be given to the ultimate Court of Appeal as to the court from which the appeal is brought. That is what the last words of section 16 (1) of the Order in Council provide.

It does not, however, seem to their Lordships that it would be satisfactory to base their decision solely on this ground. The jurisdiction of the court to order a retrial has been generally challenged and it may be that the laws of other territories from whose courts an appeal may be brought to the Court of Appeal for Eastern Africa are not strictly comparable with those of Kenya. Upon this matter their Lordships have no sufficient information. It is desirable, therefore, to examine the validity of the plea that rule 41 is ultra vires in that it is not a rule for regulating "practice "and procedure" to which the rule-making power is confined. Upon this point their Lordships are able to reach a decision without discussing the effect of section 18 (2) of the Order in Council.

The meaning of the words "practice and procedure" in section 18 of the Order in Council is not to be ascertained either by treating them as if the Order in Council of 1950 was the first Order in Council for these territories in which they appeared or by reference to those words in the Imperial statute which set up the Court of Criminal Appeal in England. On the contrary, they have behind them a history of half a century. In 1902, by the Eastern African Protectorates (Court of Appeal) Order in Council, 1902, a court was constituted, which was the first predecessor of the court whose order is now under appeal. It was called His Britannic Majesty's Court of Appeal for Eastern Africa, and it was by section 8 (1) empowered to make Rules of Court with respect to all matters of procedure relating to the exercise of its jurisdiction. Such rules were made and approved by the Secretary of State. They included rule 22, which was in these terms: "If "upon the hearing of an appeal it shall appear to the Court of "Appeal that a new trial ought to be had, it shall be lawful for "the Court of Appeal to order that the verdict and judgment shall "be set aside and that a new trial shall be had." Two things deserve notice, first, that these rules were made by the court itself, a matter regarded as having considerable importance in *Poyser* v. *Minors*,[1] and, second, that already before the establishment of the Court of Criminal Appeal in England the power to order a retrial in criminal cases upon an appeal by a convicted person was in the protectorate or colony regarded as a matter of procedure. Nor was there in this view a departure from any universal principle. For, though it might be regarded as fundamental that a man should not be put in peril twice on the same charge, yet a substantial inroad had been made upon this doctrine by the fact that it had long been the law of England that in cases of misdemeanour the Court of King's Bench had in certain circumstances jurisdiction upon motion by the convicted person to quash the verdict and order a new trial. Some further inroad was also made by procedure under writ of error, venire de novo or case stated to the Court of Crown Cases Reserved. Therefore, though there is high authority for saying that a right of appeal is itself to be regarded not as a matter of practice or procedure but as a substantive right (see, e.g., *Colonial Sugar Refining Co. Ltd.* v.

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[1] (1881) 7 Q.B.D. 329.

Irving[2] and *Newman* v. *Klausner*[3]), yet when the right of appeal has been granted there seems little or no difficulty in regarding the power to order a new trial as part of the practice and procedure of the court. It was clearly so regarded by the rule-making authority under the Order in Council of 1902. But the matter does not rest there. The Order in Council of 1902 was superseded by the Eastern African Protectorates (Court of Appeal) Order in Council, 1909, which established a new Court of Appeal for Eastern Africa. Its jurisdiction was substantially that of its predecessor and it was provided by section 9 (1) of the Order that three members of the court, one of whom should be the senior member, might make Rules of Court with respect to all matters of procedure relating to the exercise of its jurisdiction. In pursuance of this power Rules of Court were once more made, which provided by rule 29 that in a criminal appeal the court should have power (inter alia) in an appeal from a conviction to reverse the finding and sentence and acquit or discharge the accused or order the accused to be retried. It may be mentioned for a reason that will later appear that rule 28 provided that in a civil appeal the court should have power (inter alia) to order that a decree should be set aside and a new trial be had. Thus matters stood for a number of years during which, as their Lordships were informed, the power to order a new trial upon an appeal by an accused person was exercised by the court without challenge. In 1921, by the Eastern African Court of Appeal Order in Council of that year, the court was again reconstituted and its jurisdiction was conferred in language which, since it differed from that of the earlier orders, may be quoted verbatim. By the latter part of section 2 of the Order it was provided that "the said court in "the exercise of its appellate jurisdiction shall have power to "determine any question and to pass any decree, judgment or "order the determining or passing of which may appear necessary "to the said court for the purpose of doing justice in the cause "or matter before it." The width of these words explains what follows. The same rule-making power was conferred by the Order and Rules of Court were duly made, but they contained no such express power to order a new trial as had been provided in civil appeals by the former rule 28 and in criminal appeals by the former rule 29. In their Lordships' opinion there can be no doubt that they were omitted because they were unnecessary in view of the wide words of the Order. It is certain that both in civil and criminal appeals the power to order retrial continued to be exercised without challenge.

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[2] [1905] A.C. 369, 372; 21 T.L.R. 513.

[3] [1922] 1 K.B. 228, 231; 38 T.L.R. 53.

The Order in Council of 1921 was in its turn superseded by that of 1950, the relevant provisions of which have already been cited. As will have been seen, there are material changes in the language of the section conferring jurisdiction. The wide words "decree, judgment or order the determining or passing of which "may appear necessary to the said court for the purpose of doing "justice in the cause or matter before it" have gone: their place is in some measure taken by the final words in the new section 16 (1) to which attention has already been called. The rule-making power in substantially the same terms is conferred upon the same body. It has been set out in full in an earlier part of this judgment and it has already been noted that rule 41 renews the power to order a retrial which had been contained in the earlier rules but omitted from those made under the Order in Council of 1921.

The history of the jurisdiction of the court, the enactments establishing it and the rules regulating its procedure, have been set out at some length. This has been done in order that it may become abundantly clear that, whatever interpretation might be put on the words "practice and procedure" in isolation, it has been the consistent policy of the legislative authority, whether by the force of the enacting provisions alone or by their force aided by Rules of Court made by the judges, to give to the court power to order a retrial both in civil and criminal cases. Their Lordships entertain no doubt that in appeals from the courts of those territories to which the Order in Council applies there are very good reasons why such a power should be given, and it appears to them that it is not only open to them but incumbent on them to give to the words in their context the wider meaning which would bring rule 41 within their scope. For this reason, therefore, as well as that upon which the respondent relied under the last words of section 16 (1) of the Order in Council, their Lordships are of opinion that the court had jurisdiction to make the order from which this appeal is brought. It is unnecessary to refer to that part of the argument for the respondent which rested solely on the words "hear and determine."

The only other question can be briefly dealt with. The order for a new trial having been competently made will not be set aside upon an appeal to Her Majesty in Council unless the case can be brought within the principles which have been too often stated to need repetition.

Their Lordships have given careful consideration to the arguments of counsel who urged that the power to order a new trial, admittedly a discretionary jurisdiction, had been exercised on wrong principles. The gravamen of his plea was that the purpose or, at least, the result of a retrial was or would be to enable the prosecution to fill a gap in the evidence which had been due to its own default. He was far from satisfying their Lordships on this point and, as in their opinion the appeal ought to be dismissed and they have humbly so advised Her Majesty, so that the appellant will in due course be retried, they think it undesirable to say anything which may in any way prejudice his trial. As already stated, their Lordships have accordingly advised Her Majesty that this appeal should be dismissed.

Solicitors: *Theodore Goddard & Co.; Charles Russell & Co.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*

1956
Apr. 10, 11;
June 8.

EAST RIDING COUNTY COUNCIL . . APPELLANTS;

AND

PARK ESTATE (BRIDLINGTON) LTD. . RESPONDENTS.

Town and Country Planning—Enforcement notice—Form—Compliance with statutory requirements—Development before appointed day—Notice not specifying breaches of previous planning control—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 23, 24, 75.

A local planning authority served an enforcement notice, under the Town and Country Planning Act, 1947, on the owners of a holiday camp, which had been developed before July 1, 1948, the appointed day under the Act. The notice stated that the development specified thereunder appeared to be in contravention of planning control, gave particulars of the structures complained of and required the owners to discontinue the use of the land as a holiday camp and to return it to agriculture. The notice did not specify whether the development complained of contravened planning control before or after the appointed day and did not on the face of it specifically refer to any section of the Act, but notes on the back of it referred to sections 23 and 24 (applicable to development of land without permission carried out after the appointed day) and did not refer to section 75 (concerned with development of land carried out in contravention of planning control under earlier Acts). The owners sought a justices' order quashing the notice:—

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* *Present:* Viscount Simonds, Lord Morton of Henryton, Lord Radcliffe, Lord Cohen and Lord Evershed.

Held, that since the notice did not specify that the complaint was of development before the coming into operation of the Act of 1947, it did not contain the particulars required by the Act and was accordingly invalid.

Per Viscount Simonds, Lord Cohen and Lord Evershed. On its true construction the notice alleged development after the coming into operation of the Act of 1947, and under section 23 (4) of the Act the justices had power to quash the notice, on the ground that planning permission was not required.

Mead v. *Chelmsford Rural District Council* [1953] 1 Q.B. 32; [1952] 2 T.L.R. 700; [1952] 2 All E.R. 723 considered.

Held, further, unanimously, that the notice did not comply with the requirements of section 75 in that it did not allege contravention of previous planning control or make it clear that it was intended to invoke the enforcement powers under that section.

Per curiam. Even if this was not a case for quashing by justices, the notice was radically defective and could have no substantive operation.

Decision of the Court of Appeal [1955] 2 Q.B. 623; [1955] 2 All E.R. 269 affirmed.

Appeal from the Court of Appeal (Denning and Parker L.JJ. and Roxburgh J.).

This was an appeal from an order of the Court of Appeal dated March 31, 1955, dismissing the appeal of the appellants, the East Riding County Council, from an order of the Divisional Court (Lord Goddard C.J., Cassels and Lynskey JJ.), dated January 14, 1955, reversing a decision in their favour made by justices for the Petty Sessional Division of Dickering in the East Riding of the County of York. The proceedings, the subject of the appeal, were originated by a complaint preferred under section 23 (4) of the Town and Country Planning Act, 1947, by the respondents, Park Estate (Bridlington) Ltd., against the appellants before the court of summary jurisdiction sitting at Bridlington, whereby the respondents sought to have quashed an enforcement notice served on them by the appellants.

The case stated by the justices set out the following facts in paragraph 2: " (a) An enforcement notice for the purposes of the " Act, dated April 26, 1951, of which a copy is annexed, was duly " served by the [appellants] as local planning authority upon the " [respondents] relating to land in the county aforesaid, referred "to in the said notice of which the appellant was at all material "times the owner . . . (B) The use of the said land of the "[respondents] as a site for temporary dwellings (or holiday "camp) began in 1934. (C) All development on the said land "material to the issues before us was carried out before July 1, "1948, the appointed day for the purposes of the Act."

Paragraph 3 set out the respondents' contentions as follows: "(A) The Act was highly technical and as it encroached on private "rights the court must insist on strict and rigid adherence to "formalities. (B) The enforcement notice was defective in substance and form and the court should quash the notice and "treat it as a nullity." The alleged defects were enumerated. The appellants' contentions, which followed a corresponding line, were set out in paragraph 4 and the cases cited were set out in paragraph 5.

In paragraph 6 the justices expressed their opinion that: "(A) The notes on the back of the enforcement notice did not "form part of the notice, inasmuch as the notice would have "been complete without them. (B) There is no requirement in "section 23 of the Act or elsewhere that the section or sections "of the Act on which an enforcement notice is based shall be "specified in the notice, and the case first cited above" (*Lincolnshire (Parts of Lindsey) County Council* v. *Wallace Holiday Camp Ltd.*[1]) "does not afford authority for this proposition. (C) The "omission from the enforcement notice of reference to particular "sections of the Act is not misleading. (D) The enforcement "notice properly referred to the Act as a whole. (E) The notice "was not defective in substance and form, and accordingly we "dismissed the appeal."

By paragraph 7: "The question for the opinion of the High "Court is whether we came to a correct determination on the "matters of law in issue before us."

The enforcement notice was headed: "East Riding County "Council. Town and Country Planning Act, 1947. Enforcement "Notice."

It was addressed to the secretary of the respondents "and to "whom it may concern" and it gave notice in these terms: ". . . that the development or other matter hereunder specified "appears to them [i.e., the county council] to be in contravention "of planning control, namely: the erection or placing and the use "for residential and ancillary purposes of temporary dwellings and

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[1] [1953] 2 Q.B. 178; sub nom. *Lincoln County Council (Parts of Lindsey)* v. *Henshall* [1953] 1 All E.R. 1143.

"other erections on land known as Limekiln Lane Camp, Bridlington, in the said county." The location was then described by reference to the ordnance map and an annexed plan, the temporary dwellings and other erections were enumerated and described and the notice proceeded: "And they hereby require "that the followings steps shall be taken within two years from "the date on which this notice takes effect: (1) The use of the "said land for residential purposes shall be discontinued. (2) The "said temporary buildings and other erections shall be removed "or demolished and the materials thereof be removed from the "said land. (3) Any materials, sheds, huts or fences brought "onto or erected on the said land in connexion with the construc-"tion, use or demolition of the said temporary dwellings and "other erections shall be removed. (4) Every use of the said "land except the use thereof for the purposes of agriculture shall "be discontinued. Subject to the provisions of the above-"mentioned Act, this notice will take effect at the expiration of "28 days after service hereof. Expressions used in this notice "have the meanings assigned to them by the above-mentioned "Act, except where the context otherwise requires."

Finally, there was on the face of the notice, after the date and the signature of the clerk to the council, a note in these terms: "Your attention is drawn to the notes set out on the back of "this notice." These notes (inter alia) referred with sufficient accuracy to the provisions of section 23 and section 24 of the Act in regard to making application for permission for the retention of buildings or works, or the continuance of a use, to which the notice relates and to the right of a person, if aggrieved, to appeal to the appropriate petty sessional court on one or other of the grounds therein stated. The notes also referred to the penal consequences of non-compliance with the notice.

Harold Williams Q.C. and *William Roots* for the appellants. Section 23 (2) of the Act of 1947 prescribes the requirements of an enforcement notice, setting out what it must specify. Section 23 (4) gives a right of appeal to a court of summary jurisdiction, the powers of which are strictly limited thereby. This section has been considered in the following cases: *Perrins* v. *Perrins*[2]; *D'Alessio* v. *Enfield Urban District Council*[3]; *Burgess* v. *Jarvis*[4];

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[2] [1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075.

[3] [1951] W.N. 503; [1951] 2 T.L.R. 859; [1951] 2 All E.R. 753.

[4] [1952] 2 Q.B. 41; [1952] 1 T.L.R. 580; [1952] 1 All E.R. 592.

H. L. (E.)

1956

EAST RIDING COUNTY COUNCIL *v.* PARK ESTATE (BRIDLINGTON) LTD.

Buckingham County Council v. *Callingham*,[5] and *Mead* v. *Chelmsford Rural District Council*.[6] This last decision is not challenged. *Lincolnshire* (*Parts of Lindsey*) *County Council* v. *Wallace Holiday Camp Ltd.*[7] was wrongly decided. It is not quite like the present case.

One must not confuse what is in fact lacking in the notice with what is not required by the Act of 1947 to be included in it. The omissions do not violate the Act. On the true construction of sections 23 and 75 of the Act it is not essential to the validity of the notice that it should specify the date when the development was carried out or whether that date was before or after the appointed day for the purposes of the Act. Reliance is placed on *Keats* v. *London County Council*.[8]

The notice employs a neutral term and the owner of the land affected should know when the development was carried out. The use of the expression " in contravention of planning control," even though it did not specify the contravention or the control, compendiously described any possible breach of any planning Act and sufficiently informed the owners what was wrong and why. Section 23 (2) does not impose the obligations suggested by the respondents. The owner of the land knows whether permission for development has been granted and on what conditions and the planning authority does not, so that while a notice in such terms as these imposes no hardship on the recipient, it would be a hardship on the planning authority to require greater particularity. Development is an act, the act of doing something. It should not be looked at as an established fact; that is the result of the development. The statute is concerned with the doing of the act, not with controlling its results.

On its true construction the notice specifies, with sufficient precision and clarity to support its validity under section 75 of the Act, that the works were carried out " in contravention of " previous planning control."

Even if the notice was one under section 23 in respect of development alleged to have taken place after the appointed day, the magistrates were right in not quashing the order, since the notice did not specify that the development was done without permission. Accordingly, since the notice was defective, the respondents should have waited until they were charged with a breach of it before raising the point: see *Mead* v. *Chelmsford Rural District Council.*[9] The magistrates could only quash the notice if it came within the exceptional cases set out in section 12 (5).

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[5] [1952] 2 Q.B. 515; [1952] 1 All E.R. 1166.

[6] [1953] 1 Q.B. 32; [1952] 2 T.L.R. 700; [1952] 2 All E.R. 723.

[7] [1953] 2 Q.B. 178.

[8] [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303.

In summary: (1) On the true construction of sections 23 and 75 of the Act of 1947 it is not essential to the validity of an enforcement notice that it should specify the date when the development was carried out or whether that date was before or after the appointed day for the purposes of the Act. (2) The enforcement notice was not misleading, as the petty sessional court found. (3) The Act of 1947 does not require the section or sections of that Act on which the enforcement notice is based to be specified in the notice. (4) It was not alleged in the notice that the development therein referred to was carried out after the appointed day. (5) No reasons exist for quashing the notice under section 23 (4) of the Act of 1947.

G. R. Hinchcliffe Q.C. and *Alan Orr* for the respondents. As to the first of the appellants' summarized points, it is not sought to argue that it is necessary to specify in the notice the actual date when the development was carried out. But it is submitted that the planning authority must decide, before they serve an enforcement notice, whether they complain of a breach of previous planning control or of current planning control and that they should make this clear in the notice.

As to the second point, it is misleading if an enforcement notice intended to be a notice under section 75 appears by its terms to be a notice under section 23. The Divisional Court thought that this notice was misleading.

As to the third point, the notice must make clear and bring home to the recipient which of the three complaints covered by sections 23 and 75 is being made. The complaint could be of (1) a contravention of current planning control under section 23, i.e., a development carried out without permission after July 1, 1948, or (2) a contravention of current planning control under section 23 by reason of non-compliance with a condition imposed after July 1, 1948, or (3) a development before July 1, 1948, in contravention of previous planning control: section 75.

As to the fourth point, it is conceded that the position is as stated. But the whole tenor of the notice does convey and indicate that it is referring to current planning control.

As to the fifth point, the magistrates had jurisdiction to quash the order because it was established that no permission was required in respect of "the development to which the notice "relates": section 23 (4) (*a*). In any case the notice was radically defective and can have no substantive operation.

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[9] [1953] 1 Q.B. 32.

In *Lincolnshire* (*Parts of Lindsey*) *County Council* v. *Wallace Holiday Camp Ltd.*[10] it was held to be essential to make clear in the notice what was the development complained of. There are very good reasons for the necessity: see *per* Denning L.J. in the present case.[11] The three possible forms of contravention of planning control involve widely different considerations. In the case of development without permission under earlier Acts it would be necessary to consider whether the land was subject to a scheme. There are different definitions of development and the grounds on which justices may quash an enforcement order are different.

The consequences which may flow from the service of a notice are of great importance because they render the person on whom it is served liable to penal consequences. The service is an invasion of the rights of private property and if there is any doubt as to its construction and effect, it should be resolved in favour of the landowner.

This notice does not complain of breaches of previous planning control. On its true construction it is a notice under section 23 complaining of breaches of current planning control. It does not anywhere state expressly whether it is served by virtue of section 23 or section 75. The notes on the back refer to section 23 but not to section 75. It starts with a reference to the Act of 1947 and contains no reference to an earlier Act. It complains of "development," a term used in section 23 but not in the definition of "contravention of previous planning control" in section 75. It complains that the development was in contravention of "planning control," not "previous planning control." It invites, on the face of it, the person on whom it is served to read the notes on the back of it, and these refer to section 23, and state the effect of it, including the grounds on which the magistrates may quash a notice served by virtue of it, but it makes no reference to section 75 or the entirely different ground on which they may quash a notice served by virtue of that section.

"Planning control" is not defined in section 119 of the Act of 1947, but "planning permission," which must be permission granted by the controlling authority, is defined and, as defined, cannot have had anything to do with previous planning control.

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[10] [1953] 2 Q.B. 178.

[11] [1955] 2 Q.B. 623, 633; [1955] 2 All E.R. 269.

Nor can planning control have anything to do with the Town and Country Planning Act, 1932.

It is significant that this enforcement notice concludes with the words: " Expressions used in this notice have the meanings " assigned to them by the [Act of 1947] except where the context " otherwise requires."

Alan Orr following. In the marginal notes to sections 23 and 75 there is a contrast between " planning control " and " previous " planning control." Parker L.J. in the Court of Appeal[12] said that " planning control " in the Act must be read as referring to current planning control. If the appellants are right, there would be many cases in which such a notice as this would be gravely misleading since, in the case of pre-Act development, the recipient of a notice in this form might not appeal under section 23 (4) (*a*) because he would think it did not apply. Where the word " development " appears on the face of a notice in conjunction with an indication that the words used have the meanings assigned to them by the Act of 1947, that indicates post-Act development.

Harold Williams Q.C. in reply. The words " planning control " are not defined in the Act. Denning L.J. in the Court of Appeal suggested three possible contraventions.[13] These are not exhaustive and it would be putting an undue burden on the authority to require it to specify the development complained of, since the development is the act of doing something, not the established fact resulting from it, and it may not be within the knowledge of the authority what was done before and what was done after the appointed day. As to the effect of the notes on the back of the form, they are exactly right in the case of post-Act development. They are also right for section 75 cases.

The appellants are not particularly concerned with this small case but are more concerned to know how to proceed in the administration of the Act.

Their Lordships took time for consideration.

June 8. Viscount Simonds. My Lords, this appeal raises a question of exceptional difficulty. It arises upon a so-called " enforcement notice " given by the appellant county council to the respondents under the Town and Country Planning Act, 1947, which the Court of Appeal, affirming the Divisional Court, have directed to be quashed under section 23 (4) of that Act.

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[12] [1955] 2 Q.B. 635.

[13] Ibid. 633.

H. L. (E.)
1956

EAST RIDING COUNTY COUNCIL
v.
PARK ESTATE (BRIDLINGTON) LTD.

Viscount Simonds.

The relevant facts can be briefly stated and I summarize them from the case stated by the justices for the East Riding of the county of York.

An enforcement notice under the Act dated April 26, 1951, to which I will refer in detail, was duly served by the appellant council in its capacity of local planning authority upon the respondents relating to land in the said county referred to in the notice, of which the respondents were at all material times the owners. The use of this land as a site for temporary dwellings or a holiday camp began in 1934 and all development on the land material to these proceedings was carried out before July 1, 1948, that being the appointed day for the purposes of the Act.

I now turn to the enforcement notice and must state it at length.

[His Lordship read the notice and continued:] I have now stated the terms of the notice and call attention to two matters of importance. In the first place, there is no suggestion that the provisions of any other Act than the 1947 Act had been infringed, and in the second place no mention, direct or oblique, is made of section 75 of the Act, which is, as will appear, the all-important section.

Availing themselves of section 23 of the Act, the respondents preferred a complaint by way of appeal to the justices whom I have already mentioned whereby they sought to have the notice quashed. It is provided by section 23 (4) (*a*) that the court, "if satisfied that permission was granted under this Part "[Part III] of this Act for the development to which the notice "relates, or that no such permission was required in respect "thereof, or, as the case may be, that the conditions subject "to which such permission was granted have been complied "with, shall quash the notice to which the appeal relates"; by section 23 (4) (*b*) that the court, "if not so satisfied, but satisfied "that the requirements of the notice exceed what is necessary "for restoring land to its condition before the development took "place, or for securing compliance with the conditions, as the "case may be, shall vary the notice accordingly," and by section 23 (4) (*c*) it is provided that in any other case the court shall dismiss the appeal.

It is clear that the grounds on which the justices may quash an enforcement notice are strictly limited and do not exhaust the possibilities of challenge. This is recognized in section 24, which provides that the validity of such a notice shall not in any proceedings be disputed upon a ground which might have been raised in an appeal under section 23. Other grounds of defence—for example, to take a conspicuous example, that the notice was not bona fide—remain open to the person aggrieved.

Secondly, it is clear that those grounds on which the justices may quash a notice relate precisely to the earlier subsections of section 23. Subsection (1) provides that if it appears to the local planning authority that any development of land has been carried out after the appointed day (i.e., July 1, 1948), without the permission required in that behalf under that Part of the Act, or that any conditions subject to which permission was granted in respect of any development have not been complied with, then, subject as therein mentioned, they may serve on the owner and occupier of the land an enforcement notice under the section. Subsection (2) prescribes the requisites of such a notice and is important. It enacts that the notice "shall specify the "development which is alleged to have been carried out without "the grant of such permission as aforesaid or, as the case may "be, the matters in respect of which it is alleged that any such "conditions as aforesaid have not been complied with, and may "require such steps as may be specified in the notice to be taken "within such period as may be so specified for restoring the land "to its condition before the development took place, or for "securing compliance with the conditions, as the case may "be . . ." and otherwise as therein mentioned. Subsection (3) provides for the time within which an enforcement notice should take effect: in the present case nothing turns on this subsection.

I pause, my Lords, to observe that section 23, to which alone the enforcement notice in the present case refers, deals solely with development after the appointed day and with permission required to be given under the Act of 1947, but the development to which the notice referred had in fact all taken place at an earlier date, so that permission under that Act could not have been required for it. In these circumstances, it might well have appeared to the respondents that they had ample ground for asking the justices to quash the notice on the specific ground mentioned in section 23 (4) (*a*) that no permission was required under the Act of 1947 in respect thereof. Their attention had not been called, nor have I yet called your Lordships' attention, to section 75 of the Act, upon which it appears that the appellant council relied and relies. I will do so in due course.

The respondents, as I have said, preferred their complaint to the justices and before them advanced a number of contentions in which the distinction between the grounds upon which that court had statutory power to quash the notice and the grounds upon which, in other proceedings, its validity might be challenged was not properly observed. From this some confusion has arisen. It was, in the first place, contended that the Act was highly technical and, as it encroached on private rights, the court must insist on strict and rigid adherence to formalities. This, as a general proposition, commands assent, and not the less because disregard of an enforcement notice is an offence involving sufficiently serious penal consequences. Then it was contended that the notice was defective in substance and form and should be treated as a nullity, and the defects were enumerated. Here the confusion began. For the jurisdiction of the justices could not be founded on any ambiguity, lack of precision or even calculated vagueness in the notice, though such a defect might, in other proceedings, be a ground of challenge. Their jurisdiction, so far as quashing this notice is concerned, could only be invoked if, upon its true construction, it alleged that permission was required under the Act of 1947 for certain development and if that permission was not in fact required. It can, I think, be fairly said that this plea does emerge among the alleged defects, though it is somewhat obscure. Naturally enough, the contentions of the appellant council followed the same line, and the justices followed suit. In the case which they duly stated they expressed the opinion (a) that the notes on the back of the enforcement notice did not form part of the notice, inasmuch as the notice would have been complete without them; (b) that there is no requirement in section 23 of the Act or elsewhere that the section or sections of the Act on which an enforcement notice is based shall be specified in the notice, and that a case to which their attention had been called (*Lincolnshire* (*Parts of Lindsey*) *County Council* v. *Wallace Holiday Camp Ltd.*[1]) was no authority for that proposition; (c) that the omission from the enforcement notice of reference to particular sections of the Act was not misleading; (d) that the notice properly referred to the Act as a whole; and (e) that the notice was not defective in substance and form. Accordingly they dismissed the appeal, and the question they stated for the opinion of the court was whether they came to a correct determination on the matters of law in issue before them.

My Lords, it appears to me that we have travelled far from the only matters upon which the justices had jurisdiction to pronounce. This was not, however, quite the view of the

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[1] [1953] 2 Q.B. 178; [1953] 2 W.L.R. 1088; sub nom. *Lincoln County Council* (*Parts of Lindsey*) v. *Henshall* [1953] 1 All E.R. 1143.

Divisional Court; for, as, with great respect, I think, the same confusion recurred, so that Lynskey J., delivering a judgment in which the other members of the court concurred, said: "This "notice served on the appellants [the present respondents] in "this case in terms refers them to section 23 and anyone reading "this notice, I should have thought, would read it as being a "notice relating to development after the Act to which section 23 "applies. There is nothing in the notice at all to indicate in any "way that it is dealing with pre-Act development or dealing in "any way with development to which section 75 applies. In "those circumstances it seems to me that this notice is a bad "notice. Although a notice is not required to be in any specified "form it is a notice which ought to give the person who receives "it a clear indication as to what it is intended to apply and what "development it is sought to remedy." The appeal was accordingly allowed and the notice was directed to be quashed. I do not dissent from the conclusion to which the Divisional Court came, and I think that, in the earlier part of the passage that I have cited, the view is clearly expressed that, upon its true construction, the notice purported to refer to development for which permission under the 1947 Act was required, whereas in fact such permission was not required. That, not the lack of clear indication, gave jurisdiction to quash.

The appellant council appealed to the Court of Appeal. That court took the same view of the construction of the notice. Thus, Denning L.J. said[2]: "It seems to me that, on a fair reading of "that enforcement notice, it complains only of breaches of the "existing planning control since July 1, 1948, and not at all of "breaches of previous planning control." So also Parker L.J.[3]: "Accordingly, the only point is whether, on its true construction, "and on a fair reading of it, the enforcement notice in this case "is one dealing with a breach of previous planning control or of "current planning control," and upon that question the learned Lord Justice came to the same conclusion as Denning L.J.

Upon such a question I should, in any case, hesitate to differ from such a consensus of opinion. But it appears to me to be clearly right. The notice is the plainest assertion that there has been development for which permission under the 1947 Act ought to have been, but had not been, obtained. The assertion was wrong. No such permission was required and upon complaint the justices were bound to quash the notice.

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[2] [1955] 2 Q.B. 623, 633–634; [1955] 2 All E.R. 269.

[3] [1955] 2 Q.B. 623, 635.

How, then, is it sought to sustain the notice? My Lords, I come to section 75 of the Act. That section, which is in Part VIII of the Act, provides by subsection (1) that: "Where "any works on land existing at the appointed day were carried "out, or any use to which land is put on that day was begun, "in contravention of previous planning control, then, subject to "the provisions of that section, the provisions of Part III of this "Act with respect to enforcement notices shall apply in relation "thereto as they apply in relation to development carried out "after the appointed day without the grant of permission in that "behalf under the said Part III." The same section contains numerous and elaborate subsections which would require careful consideration by any person who had carried out any works alleged to fall within its scope, but I need refer only to subsection (9), which provides that: "For the purposes of this "section, works on land shall be deemed to have been carried "out, and uses of land to have been begun, in contravention of "previous planning control—(*a*) where at the material time the "land was subject to a resolution to prepare a planning scheme, "if carried out or begun otherwise than in accordance with "permission granted in that behalf by or under the interim "development order; (*b*) where at the material time the land was "subject to a planning scheme, if carried out or begun otherwise "than in conformity with the provisions of the scheme or of "permission granted thereunder," and the same subsection also dealt with the case in which permission for any works or use was granted subject to conditions as therein mentioned.

It is this section upon which the appellants rely, claiming that the notice upon its true construction alleges that the works specified therein have been carried out without the necessary permission "in contravention of previous planning control," and that it does so with all the clarity and precision which a valid notice postulates. My Lords, it appears to me that this notice does nothing of the kind. I have already stated what, in agreement with the courts below, I consider to be the true meaning of the notice, and that is sufficient to conclude this case. But suppose that I am wrong in this. It may be that then the justices cannot quash the notice. What then ensues? Assuredly not that it is a valid notice alleging that works were carried out or use of land begun in contravention of previous planning control. For that clearly it does not allege. It is at this point that some of the contentions, irrelevant, as I think, to the real issue before the justices, may come into play. For the line of argument vigorously pursued on behalf of the appellants was to the effect that the use of the general words "in contravention of planning "control," without specifying what contravention or what control, was sufficient to inform the respondents of what was wrong and why it was wrong. It was, I think, admitted that the words "planning control," which deliberately avoid the technical expression "previous planning control," were chosen in order to cover compendiously any possible breach of any possible planning Act. This is not, in my opinion, a legitimate way of framing a notice, the disregard of which involves penal consequences, nor is it what section 23 (2) requires. Still less is it what is required when the co-operation of section 75 with section 23 is demanded. I do not suggest that the form of notice adopted by the council was intended to mislead. I am sure it was not, but what I can only call the marked avoidance of any reference to section 75 and the deliberate use of words calculated to suggest a contravention of the 1947 Act make it impossible for them to rely on the notice as a valid notice under the Act.

I am therefore of opinion that the notice, if it was not, as in my opinion, it was, a notice which it was the duty of the justices to quash, was, in any case, not a notice upon which the appellants can rely.

In the course of the argument before your Lordships and in the courts below reference was made to the case of *Lincolnshire (Parts of Lindsey) County Council* v. *Wallace Holiday Camp Ltd.*[4] In that case, too, the same confusion arose between the statutory grounds on which the justices could quash a notice and other grounds on which such a notice might in other proceedings be challenged. I do not repeat what I have already said upon this point. The decision in question was no doubt justified because, as Lord Goddard C.J. said[5]: "The justices, how-"ever, had power to quash here because permission under the "Act of 1947 was not required in respect of a development which "had been carried out before July 1, 1948." He took, as I understand it, the same view of the construction of the notice there under consideration as I do of the notice in the present case.

Lord Morton of Henryton. My Lords, in my opinion, the enforcement notice served by the appellants on the respondents on April 26, 1951, was invalid because it did not fulfil the requirements of the Town and Country Planning Act, 1947.

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[4] [1953] 2 Q.B. 178.

[5] Ibid. 183.

Enforcement notices can be served under section 23 (1) or under section 75 (1) of the Act. The circumstances in which a notice can be served under section 23 (1) are: "If it appears to "the local planning authority that any development of land has "been carried out after the appointed day without the grant of "permission required in that behalf under this Part of this Act, "or that any conditions subject to which such permission was "granted in respect of any development have not been complied "with . . ." The circumstances in which a notice can be served under section 75 (1) of the Act are: "Where any works on land "existing at the appointed day were carried out, or any use to "which land is put on that day was begun, in contravention of "previous planning control . . ." The "appointed day" was July 1, 1948, and it is to be observed that section 23 (1) applies only to a development of land carried out after that date, while section 75 (1) applies only to a case in which works on land were existing, or land was being used, on that date.

Section 23 (2) of the Act provides that: "Any notice served "under this section (hereinafter called an 'enforcement notice') "shall specify the development which is alleged to have been "carried out without the grant of such permission as aforesaid "or, as the case may be, the matters in respect of which it is "alleged that any such conditions as aforesaid have not been "complied with . . ." My Lords, as I read these words, they require the planning authority not only to specify the development to which the notice relates, but also to state either (a) that this development appears to the authority to have been carried out after July 1, 1948, without the grant of permission required in that behalf under Part III of the Act, or (b) that it appears to the authority that the following conditions, subject to which such permission was granted, have not been complied with in respect of the following matters—setting out the conditions in question and the matters in respect whereof such conditions have not been complied with.

The notice of April 26, 1951, refers to the "development or "other matter hereunder specified." "Development," as defined by section 12 (2) of the Act, includes the carrying out of building operations on land and the making of any material change in the use of any buildings or other land. I do not think that the words "or other matter" are happily chosen, but the notice goes on to make it clear that the development or other matter to which the notice relates is "the erection or placing "and the use for residential and ancillary purposes of temporary "dwellings and other erections" on certain land which is clearly identified. The temporary dwellings and other erections are then identified by description and by reference to a plan attached to the notice.

My Lords, I think that the development to which the notice relates is thus sufficiently identified. The notice does not, however, allege either that the development has been carried out after July 1, 1948, without the grant of permission under Part III of the Act, or that such permission was granted subject to conditions which have not been complied with. The development is simply alleged to be "in contravention of planning control." The result is that if the notice of April 26, 1951, on its true construction, is a notice of an alleged contravention of the provisions of the Act of 1947 by a development carried out after July 1, 1948, it is, in my view, invalid because it does not comply with the provisions of section 23 (2) of the Act of 1947.

I now consider whether the notice can possibly be regarded as a valid notice relating to works carried out, or land used, in contravention of previous planning control within section 75 of the Act of 1947. In my opinion, it cannot, for two reasons. First, because the notice gives no indication that it relates to a contravention, before July 1, 1948, of planning control existing before that date. On the contrary, there are indications that it relates to a development carried out after that date. For instance, the words "*to be* in contravention" apply more aptly to a contravention of existing planning control, and the only sections mentioned in the notes on the back of the notice (to which the reader's attention is drawn by a note at the end of the notice) are sections 23 and 24. Secondly, section 75 provides that, in the cases to which it applies: ". . . subject to the "provisions of this section, the provisions of Part III of this "Act with respect to enforcement notices shall apply in relation "thereto as they apply in relation to development carried out "after the appointed day without the grant of permission in "that behalf under the said Part III." I think it follows, from this incorporation of the provisions of section 23 (2), that some indication must be given of the nature of the alleged contravention of previous planning control. I do not venture to suggest the form of such indication, as your Lordships were not referred to the terms of any earlier Act imposing planning control.

For these reasons, I am of opinion that the notice of April 26, 1951, was wholly invalid.

Counsel for the appellants submitted that section 23 (2) should not be construed as imposing on the planning authority the obligations which I have already set out. He suggested that the owner of the land would know when the development of the land was carried out and whether permission had been granted and, if so, on what conditions, whereas the planning authority might not know the first of these matters; thus a notice couched in general terms, such as the present notice, involved no real hardship to the recipient, whereas a requirement of greater particularity in the notice might impose real hardship on the authority. My Lords, I cannot accept this submission. I think that the words of section 23 (2), on their natural construction, do impose upon the authority the obligations in question, and I see no reason for giving them any other construction. I agree that the owner of the land will probably know the relevant facts. This may not always be so, as he may have bought the land shortly before he receives the notice; but, whether or not he knows the facts, it is only right that he should know what the authority alleges against him. As to the position of the authority, I make two observations. First, the authority cannot serve a notice unless it "appears" to it that the state of facts described in section 23 (1) or in section 75 (1) exists; and it is to be assumed that no authority would serve a notice without making due inquiry as to any facts not already recorded in its books and ascertaining whether the facts brought the case within section 23 (1) or within section 75 (1). Secondly, these two sections confer wide powers upon the authority, and the exercise of these powers may involve very great loss to the recipient of the notice. It is not surprising if the legislature imposes upon the authority the duty of telling the recipient plainly what is the case which he has to meet.

Before the justices the present respondents contended that: "The enforcement notice was defective in substance and form "and the court should quash the notice and treat it as a "nullity." The justices held that the notice was not defective and dismissed the appeal. The question which they stated for the opinion of the High Court was: "Whether we came to a "correct determination on the matters of law in issue before us." My Lords, I would answer that question in the negative. I doubt whether the justices had power to quash the notice, as the jurisdiction to do so is conferred only by section 23 (4) of the Act of 1947 and is strictly limited by the terms of that subsection. I need not, however, pursue that matter further. The practical result is the same, apart from any question of costs, whether the justices ought to have treated the notice as a nullity ab initio, or ought to have quashed it. I understand that the majority of your Lordships take the latter view and that no question arises as to the costs, the appellants having agreed to pay the respondents' costs in any event. In these circumstances I do not desire to dissent from the motion proposed by my noble and learned friend on the Woolsack.

Lord Radcliffe. My Lords, I agree with the views that have been expressed by my noble and learned friend, Lord Morton of Henryton.

In my opinion, the enforcement notice suffered from one radical defect: it did not contain such particulars of what was alleged against the offender as the Act in question required. It is evident that those who framed it thought that it was a sufficient compliance with the Act to inform the respondents that the development specified appeared to the county council to be "in contravention of planning control." I have a good deal of sympathy with them in their problem of finding the right form of words that would do justice to the rather obscure prescriptions of the Act on one side and, on the other, would correspond with their own necessarily imperfect knowledge of the exact circumstances of which they wished to complain. They seem to have chosen the general phrase "in contravention of planning control," which, in my view, is, at any rate, wide enough to cover everything before or after 1948: for, in this field, planning control has been a continuous régime, involving, indeed, different rights and obligations and different remedies and consequences from time to time, but still a continuous system with the nature of which everyone concerned has had to be more or less familiar. But I think that such a general phrase is not enough and that the Act does entitle an alleged offender to receive a particular allegation, not merely of what he is said to have done that is wrong but also of the respect in which what he has done is said to be a ground for the issue of an enforcement notice against him. Considering the serious consequences that may result either from complying with a notice or from failing to comply with it, I do not think that any rule less strict than this can be upheld by the courts.

Taking this general view of what the notice sought to do and of what is amiss with it, I am afraid that I do not find myself persuaded by the other argument against its validity, that upon its true construction it was a notice "under section 23" of the

Act, whereas the development complained of took place before 1948. All notices of this kind are "under section 23," because section 75 itself so provides. But, in my view, it would be going too far to pin this notice down to a positive allegation that what is complained of is some post-1948 development or that the statutory powers invoked are confined to those given by section 23. It is its vagueness, not its particularity, that is its vice. "Planning control" is, after all, the phrase which the Building Restrictions (War-Time Contraventions) Act, 1946, had used in reference to the then existing system: "previous planning "control" is a phrase evolved by section 75 of the current Act: and "current planning control" is not a phrase which the Act uses at all but owes its existence to the nice clarity of the judicial mind. Read by an ordinary layman, the notice would not convey more to him than that the Town and Country Planning Act and its powers were being invoked against him: and, read by his legal advisers, they would have to know enough about the Act not to be misled by the notice's form before they would be able to appreciate the significance of those special words or phrases that do indeed point more appropriately to the enforcement powers of section 23 than to the enforcement powers of section 75.

I agree with my noble and learned friend, Lord Morton of Henryton, that, strictly, this was not a case for quashing by justices. But I do not see any useful purpose served by upsetting the order of the Divisional Court, since, if the notice is, as I think, radically defective, it can have no substantive operation before any court of law.

LORD COHEN. My Lords, the Town and Country Planning Act, 1947, repealed earlier legislation on the subject and in Part III dealt with control of development of land after the appointed day (July 1, 1948). Section 12 (1) provides that permission shall be required in respect of any development of land carried out after the appointed day, and subsection (2) contains a definition of development which differs in some respects from the definition of development in the repealed Acts. Section 13 deals with the grant of permission for development under Part III and provides that permission may be granted either unconditionally or subject to such conditions or limitations as may be specified. Section 23 deals (see the marginal note) with "enforcement of planning control." Subsections (1) and (2) of that section read as follows: "(1) If it appears to the local

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"planning authority that any development of land has been "carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, or "that any conditions subject to which such permission was "granted in respect of any development have not been complied "with, then, subject to any directions given by the Minister, the "local planning authority may within four years of such development being carried out or, in case of non-compliance with a "condition, within four years after the date of the alleged failure "to comply with it, if they consider it expedient so to do "having regard to the provisions of the development plan and "to any other material considerations, serve on the owner and "occupier of the land a notice under this section. (2) Any notice "served under this section (hereinafter called an 'enforcement "'notice') shall specify the development which is alleged to "have been carried out without the grant of such permission "as aforesaid or, as the case may be, the matters in respect "of which it is alleged that any such conditions as aforesaid "have not been complied with, and may require such steps as "may be specified in the notice to be taken within such period "as may be so specified for restoring the land to its condition "before the development took place, or for securing compliance "with the conditions, as the case may be; and in particular "any such notice may, for the purpose aforesaid, require the "demolition or alteration of any buildings or works, the discontinuance of any use of land, or the carrying out on land of any "building or other operations." Subsection (3) provides that an enforcement notice shall take effect at the expiration of such period (not being less than 28 days after service thereof) as may be specified in the notice unless within the period so specified an application is made for permission for the retention on the land of any buildings or works or continuance of any use of the land to which the enforcement notice relates or an appeal is made to the court in accordance with the provisions of the section. Subsection (4) deals with appeals and provides that the appeal shall be to the appropriate court of summary jurisdiction and that on any such appeal the court—"(*a*) if satisfied that "permission was granted under this Part of this Act for the "development to which the notice relates, or that no such "permission was required in respect thereof, or, as the case may "be, that the conditions subject to which such permission was "granted have been complied with, shall quash the notice to "which the appeal relates; (*b*) if not so satisfied, but satisfied "that the requirements of the notice exceed what is necessary "for restoring land to its condition before the development took "place, or for securing compliance with the conditions, as the "case may be, shall vary the notice accordingly; (*c*) in any other "case shall dismiss the appeal."

I pause here to observe that it has been held, and I think rightly held, (1) that the court of summary jurisdiction can only quash the enforcement notice on proof of one or other of the matters mentioned in subsection (4) (*a*); (2) that if the notice is defective in respects not there mentioned, the magistrate cannot quash the conviction but on any proceedings to enforce an alleged breach of the planning control the accused may plead that the notice was bad and will not be prejudiced by the fact that it had not been quashed. See *Mead* v. *Chelmsford Rural District Council.*[6]

Section 24 contains supplementary provisions as to enforcement of planning control, including (1) a power for the planning authority to enter on the land and take any steps required by the enforcement notice to be taken and not so taken; (2) a power for the authority to recover any expenses incurred in exercising the first-mentioned power; (3) a provision exposing any person who continues to use land in breach of an enforcement notice or in breach of conditions required to be complied with in respect of any use of such land to a penalty on conviction not exceeding £50, and if the use is continued after conviction to a further penalty not exceeding £20 for each day the use continues.

Part VIII of the Act deals with its application to special cases. Section 75, the first section in Part VIII, deals (see the marginal note) with "Existing development contravening previous "planning control." Though the marginal note uses the word "development," that word does not appear in the body of section 75, possibly because the definition of development in the earlier Act of 1932 differs from that in section 12 of the 1947 Act. Section 75 (1), so far as material, provides as follows: "Where any works on land existing at the appointed day were "carried out, or any use to which land is put on that day was "begun, in contravention of previous planning control, then, "subject to the provisions of this section, the provisions of "Part III of this Act with respect to enforcement notices shall "apply in relation thereto as they apply in relation to develop"ment carried out after the appointed day without the grant of "permission in that behalf under the said Part III." The effect

[6] [1953] 1 Q.B. 32; [1952] 2 T.L.R. 700; [1952] 2 All E.R. 723.

of this is to incorporate section 23 mutatis mutandis. It is obvious that section 23 (4) (*a*) could not be applied, since in dealing with previous planning control there could be no question of permission having been granted under the 1947 Act; hence by section 75 (5) a new paragraph (*a*) is substituted for that in section 23 (4) where the enforcement notice is served by virtue of section 75. It reads as follows:—" (*a*) if satisfied that the " works or use to which the notice relates are not works or " a use to which section 75 of this Act applies, shall quash " the notice to which the appeal relates." Subsection (9) explains what is meant by contravention of previous planning control. So far as material it provides: " For the purposes of " this section, works on land shall be deemed to have been " carried out, and uses of land to have been begun, in contra- " vention of previous planning control—(*a*) where at the material " time the land was subject to a resolution to prepare a planning " scheme, if carried out or begun otherwise than in accordance " with permission granted in that behalf by or under the interim " development order."

I turn to the facts. It is common ground between the parties that the use of the land to which the appellants objected commenced in 1934 and that all the development referred to in the enforcement notice was carried out before the appointed day. If, therefore, the notice on which the appellants rely is valid, it must be because it was rightly served by virtue of section 75 and complied with the requirements of section 23 (2) modified so far as necessary having regard to the fact that the complaint was of contravention of " previous planning control."

The notice is headed " Town and Country Planning Act, 1947. " Enforcement Notice." By it the appellants " give notice that " the development or other matter hereunder specified appears " to them to be in contravention of planning control." The notice specifies the erection or placing and the use for residential and ancillary purposes of temporary buildings and other erections on land known as Limekiln Lane Camp, and identifies the dwellings and erections to which objection is taken. It then proceeds to specify the steps which the respondents are required to take and states that subject to the provisions of the Act the notice will take effect at the expiration of 28 days after service thereof. It concludes: " Expressions used in this notice have " the meanings assigned to them by the above-mentioned Act, " except where the context otherwise requires."

Some reliance was placed on those words, but I do not attach importance to them, since (1) even without them I should have assumed that development meant development under the Act mentioned in the heading; and (2) the Act contains no definition of "planning control."

Below the signature of the town clerk appear the words: "Your attention is drawn to the notes set out on the back of this "notice." On the back appears a summary of the provisions of section 23 (3) and section 24 (1), but no reference to section 75.

Was this a good notice having regard to the facts found which make it clear that the only breach of planning control which could be established was contravention of "previous planning "control"?

This question raises a matter of construction of section 23 (2). As I read that section, while it prescribes no particular form, it does by its terms require that, in the case of development after the appointed day, the enforcement notice must bring home to the person on whom it is served, first, whether the authority objects to development without permission or to failure to comply with conditions, and secondly, if the objection is to development, that the development is alleged to be without permission. No particular formula is prescribed and the notice could satisfy this last condition either by an express statement to the effect that the development was without permission or by a reference to section 23 (2) which necessarily connotes an allegation that the development was without permission.

We are, however, not concerned with development since the appointed day. The notice, if valid, must be justified under section 75. How must the authority adapt section 23 to a case of development before the appointed day? In such a case it seems to me that the notice must not only specify the works which are alleged to have been carried out or the use to which land is alleged to have been put on the appointed day, it must make it clear that such works are alleged to have been carried out before the appointed day or such use is alleged to have been on the appointed day "in contravention of previous planning "control."

If that be the true view of the requirements of section 23 (2), when made applicable by virtue of section 75 (1), it necessarily follows that the notice in the present case failed to comply with the requirement since, as I read the notice, there is nothing in it to indicate to the recipient that the planning control alleged to have been contravened was "previous planning control" and not planning control under the Act.

If the matter rested there, the magistrates might still have been right in refusing to quash the enforcement notice since it could not, if regarded as a notice served by virtue of section 75, be brought within the paragraph substituted by subsection (5) of that section for paragraph (*a*) of section 23 (4). The principle of the decision in *Mead* v. *Chelmsford Rural District Council*,[6] with which I respectfully agree, would apply. The notice could not be quashed under section 23 (4), but the respondents could raise the question of the validity of the notice in any proceedings against them for failing to comply with it.

But was the notice on its construction a notice under section 23 as made applicable by section 75 or was it a notice under section 23 in respect of development alleged to have taken place after the appointed day? The Court of Appeal construed it in the latter sense, and I agree with them. I am content to adopt for the purposes of my judgment the observations of Denning L.J. when he says[7]: "It seems to me that, on a fair reading "of that enforcement notice, it complains only of breaches of "the existing planning control since July 1, 1948, and not at "all of breaches of previous planning control. The notice starts "off with a direct reference to the Act of 1947 and no earlier "Act; it refers to 'development,' which is a term particularly "defined by the Act of 1947 and has a much wider meaning in "that Act than in other Acts; it refers simply to 'planning "'control' and not to 'previous planning control'; and, finally, "it refers on the back to section 23 without a single reference to "section 75. These considerations lead me to the conclusion "that this notice complains only of contraventions after July 1, "1948." I would only add that I think the conclusion which the learned Lord Justice reached is reinforced by the fact that the development is stated in the notice to be, not to have been, in contravention of planning control.

Mr. Williams submitted that, even on this construction of the notice, the magistrates were right in refusing to quash the order because the enforcement notice did not specify that the development was done without permission. Being a defective notice, he said that the principle of the decision in *Mead's* case[8] was applicable and the respondents must wait to raise the point until they are charged with breach of the enforcement notice.

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[6] [1953] 1 Q.B. 32.

[7] [1955] 2 Q.B. 623, 633–634.

[8] [1953] 1 Q.B. 32.

I cannot accept this argument. On the construction I have placed on the notice, it alleges that the respondents had developed the land since the appointed day without permission. It was proved before the magistrates that the development took place before the appointed day, and it was agreed that no obligation rested on the respondents to obtain permission under the law in force before the appointed day. It seems to me that, in these circumstances, the respondents proved that no such permission was required in respect thereof, that is, in respect of "the "development to which the notice relates." The magistrates, therefore, had jurisdiction to quash the enforcement order, and, in my opinion, they should have done so.

For these reasons, which are substantially the reasons given by the Court of Appeal for their decision in the present case, I would dismiss the appeal.

Lord Evershed. My Lords, I agree with the order proposed by the noble and learned Lord on the Woolsack.

My Lords, the Town and Country Planning Act, 1947, introduced a system of control of all land use more strict and comprehensive than the control to which it had been subject under previous legislation, more particularly under the Town and Country Planning Act, 1932, and the Town and Country Planning (Interim Development) Act, 1943, both wholly repealed by the 1947 Act from the appointed day.

The power to enforce this new control by way of enforcement notice is contained in sections 23 and 24 of the Act of 1947. According to section 23 (1) the power arises in either one of two events: namely, (1) where "development" has been carried out since July 1, 1948, without the permission of the planning authority, and (2) where there has been non-compliance with any condition on which the permission for development had been given by the planning authority.

Although no form of enforcement notice is prescribed, the essential requirements of every such notice are found in section 23 (2). Thus the notice "shall specify the development which "is alleged to have been carried out without the grant of such "permission as aforesaid or, as the case may be, the matters "in respect of which it is alleged that any such conditions as "aforesaid have not been complied with." It is, in my opinion, clear from the language which I have quoted that it is not sufficient for the planning authority in an enforcement notice merely to denote the buildings or other matters of which they complain, and then to require that such buildings be removed or that the matters complained of be remedied. The notice must also draw specific attention to the grounds of complaint: that is, it must allege as regards any buildings or other matters of complaint either that they constitute development for which no permission has been granted, or (as the case may be) that they constitute or have involved non-compliance with conditions imposed when the permission was given. So much is, in my judgment, the inescapable effect of the language above cited from section 23 (2) of the Act.

In the present case it has been found and is agreed that none of the buildings or other matters complained of in the enforcement notice was carried out or done after July 1, 1948. They are, therefore, prima facie, wholly outside the scope of the control contained in Part III of the Act. It is, however, alleged by the appellants that, at the time these buildings or other matters were carried out or done, the land in question was subject to a resolution to prepare a scheme and to an interim development order under the previous legislation of 1932 and 1943: and by section 75 (1) (in Part VIII of the Act of 1947 entitled "Application to special cases") it is provided that: "Where any works on land existing at the appointed day were "carried out, or any use to which land is put on that day was "begun, in contravention of previous planning control, then, sub-"ject to the provisions of this section, the provisions of Part III "of this Act with respect to enforcement notices shall apply "in relation thereto," that is, in relation to the existing works or use, "as they apply in relation to development carried out "after the appointed day without the grant of permission in that "behalf under the said Part III." Subsection (9) of the same section declares that works on land shall be deemed to have been carried out and use of land to have been begun in contravention of previous planning control "(*a*) where at the material time the "land was subject to a resolution to prepare a planning scheme, "if carried out or begun otherwise than in accordance with per-"mission granted in that behalf by or under the interim develop-"ment order; (*b*) where at the material time the land was "subject to a planning scheme, if carried out or begun otherwise "than in conformity with the provisions of the scheme or of "previous permission granted thereunder." The subsection goes on to provide for the case where permission had been granted subject to conditions restricting the period during which the works or use could be continued, so that, where such period had expired before the appointed day, section 75 applies "as if the works or "use had been carried out or begun in contravention of previous "planning control."

It follows that the appellants were enabled by the terms of section 75 of the Act to serve an enforcement notice related to the works and other matters here in question if such works or other matters were in fact (as they allege) carried out or done in contravention of the 1932 and 1943 planning control. But, as I read section 75 (1) and (9) in conjunction with section 23 (2), it was incumbent upon the appellants in any valid or effective enforcement notice so related to pre-1948 works and other matters to allege of them that they had been in contravention of previous planning control, as that phrase is used and defined in section 75. In other words, though I agree with the learned counsel for the appellants that there is no necessity to refer in terms or by number to section 75 of the Act, the joint effect of that section and section 23 is, in the case of complaints based on alleged contravention of previous planning control, so to specify or allege, by way of necessary analogy to the obligation which, in my judgment, arises in the case of alleged contravention of the new 1947 Act control. My view is reinforced by the further circumstance that the powers and duties of the justices under section 23 (4) of the Act upon an appeal against an enforcement notice are, by virtue of section 75 (5), in terms different when such notice is "served by virtue of this section" (that is, section 75); a provision which, to my mind at least, requires that the notice, if intended to relate to alleged contravention of previous planning control, shall in effect so state upon the face of it.

I turn to the enforcement notice in the present case, which, I apprehend, must be construed in the light of the statutory provisions by virtue of which it purports to have been served. I do not repeat the grounds which have already been stated by your Lordships for rejecting the view, as a matter of construction, that such notice is apt to relate to works and other matters existing on July 1, 1948, and alleged to constitute contravention of the planning control contained in the Acts of 1932 and 1943.

But the question remains whether the notice, not only, upon its face and according to its ordinary sense, constitutes allegations of contravention of post-1948 control but suffers also from the vice of being, even in that respect, ambiguous and therefore wholly ineffective. I have already expressed my view that a notice related to alleged contravention of the 1947 Act control must, in order to satisfy the requirements of form according to section

23 (2), not only indicate the buildings or other matters complained of, but must also make it sufficiently clear upon which of the two grounds indicated in subsection (1) they are objected to. In my judgment, upon a fair reading of the present notice according to its terms, the complaint and the allegation are that the buildings and other matters complained of constitute development carried out after the appointed day without permission. There is, to my mind, nothing in the language used apt to cover or suggest an allegation that any of the matters complained of constitute breaches of conditions imposed upon the grant of permission. It is to be observed that under section 23 (2) the antithesis is between "development" on the one hand and "matters in respect of which it is alleged that . . . conditions ". . . have not been complied with" on the other. It is true that at the beginning of the present notice complaint is made of "development *or other matter* hereunder specified"; but if the items thereunder specified are referred to and regard is had to the steps which are required to be taken, there is nowhere to be found any suggestion that there had been conditions imposed and that such conditions had been broken. I therefore do not read the enforcement notice as ambiguous or as failing, upon the face of it, to satisfy the terms of section 23 (2) by an omission to indicate whether the alleged contravention of control consists of development without permission or of breach of conditions imposed upon the grant of permission. I read it as constituting an allegation (imprecise, no doubt, but sufficiently clear to a recipient) that all the specific items set out in the notice constituted development of land which had been carried out after July 1, 1948, without the grant of permission. So much is indeed, apart from the date, in exact accordance with what the appellants have at all times alleged and now allege; for it is their case that the works and use of which they complain were carried out or begun without permission granted under the interim development order.

My Lords, if my view of the requirements of the Act and the construction of the notice is correct, then I would answer the question posed by the justices in the case stated in the negative. But there is still the question whether in the circumstances the justices should (having interpreted the notice as one alleging post-1948 development without permission) have quashed the notice. The powers of the justices to quash are narrowly defined by section 23 (4), as amended (where appropriate) by section 75 (5); and it is expressly enjoined upon the justices in all cases, other than those specified, that they shall dismiss the appeal. Thus, in a case of contravention of post-1948 control the right and duty of the justices to quash a notice appears to be limited to the three cases where (contrary to the allegation of the authority) (1) permission had in fact been given, or (2) permission was not properly required, or (3) the conditions to the grant of permission had in fact been complied with. In the present case it is not in doubt that the power and duty to quash arose, if at all, under the second of the above heads, that is, on the ground that no permission was in truth required.

It cannot, I think, be doubted that the terms of section 23 (4) (*a*) and the formulation of the three grounds upon which a notice under the section may be quashed assume the premise on which the notice proceeds—namely, that the matters complained of have been done or undertaken since July 1, 1948. The relevant words, "that no such permission was required in respect thereof," according to their more natural meaning refer to those cases in which, by virtue of section 12 (5), the development is of the limited character for which permission is excused. Upon the face of it, the subsection makes no provision for the case where the development alleged has not occurred in fact at all. In this respect there appears to me to be a distinction between the language of paragraph (*a*) of section 23 (4) itself and the paragraph (*a*) which in appropriate cases (that is, cases of alleged contravention of previous planning control) section 75 (5) requires to be substituted; for the general terms of the substituted paragraph (*a*) would appear to cover the case where the works or use alleged to be within the scope of section 75 turn out in fact to be outside that section as having been executed after and not before, and therefore not "existing at," the appointed day.

In the case of *Mead* v. *Chelmsford Rural District Council*[8] it was held by the Divisional Court, having regard to the limitations of the language of section 23 (4), that the justices' power to quash could not arise where the notice was upon the face of it a nullity—in that case, by reason of its failure, in accordance with the requirement of section 23 (3), to specify the period at the expiration of which the notice should have effect.

But, my Lords, the present is not, in my view, a case in which the enforcement notice is a nullity upon the face of it. Upon its face (as I construe it) the notice alleged, and alleged in due compliance with section 23 (2), specific development carried out since July 1, 1948, and carried out without the permission required by the Act of 1947. The true facts being that none of the development was carried out after July 1, 1948 (as by the terms of the notice alleged), is it too great a stretch of the natural language of section 23 (4) (*a*) to say that no permission under the 1947 Act was required for such development, because the development was executed at a date which made any such permission inapposite and, indeed, impossible?

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[8] [1953] 1 Q.B. 32.

In the present case, where the facts are undisputed, I do not doubt that the respondents would be fully protected by the expression of your Lordships' opinion that the appellants have failed effectively to exercise the power conferred upon them by section 75 of the Act to invoke the provisions of section 23 in relation to the works and use complained of. The notice which the appellants have served would have no more vitality in it than if it had been quashed; and it is conceded that it is now too late for the appellants to retrace their steps and serve a fresh notice in proper and appropriate form.

But other cases may well arise in which serious questions of fact might be involved, questions whether in truth the development had been carried out before the appointed day or whether the land had in fact ever been used as alleged. If in such cases it were beyond the jurisdiction of the justices upon an appeal to determine such questions of fact, then the only course open to the owner would be to await the taking of further steps by the authority under section 24 of the Act and then to challenge the validity of the notice; a course which might well involve him in a long period of uncertainty and would certainly be likely to expose him to serious expense. Equally might such a course of proceedings be an embarrassment to the authority, who might find, when the facts had turned out ultimately against them, that it was then too late to exercise their statutory powers and duties at all.

The words in section 23 (4), "no such permission was "required in respect thereof," are clearly capable of application to any case in which permission was not in truth required under the 1947 Act, whether because the development was of a kind which by the terms of the Act called for no permission or because the development, by reason of the date when it was carried out, was outside the scope of the Act altogether. In the absence, therefore, of any provision for the case of a notice related to development alleged to have been carried out after July 1, 1948, but executed in fact prior to that date, and having regard to the incongruity which would otherwise appear to arise in the converse case of a notice related to development alleged to have been carried out before, but in fact executed after, the appointed day, I think the Court of Appeal and the Divisional Court were right in holding that in the circumstances and upon its true construction the enforcement notice of April 26, 1951, ought to have been quashed by the justices.

I would accordingly dismiss the appeal.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co. for R. A. Whitley, Beverley; Corbin, Greener & Cook for Lambert & Parkinson, Bridlington.*

F. C.

[HOUSE OF LORDS.]

NYALI LTD. . . . . APPELLANT;

AND

ATTORNEY-GENERAL . . . . . RESPONDENT.

H. L. (E.)*
1956
Apr. 16, 17;
June 8.

Bridge—Toll—Special agreement—Exemption of "military on duty or "their . . . transport"—Extent of exemption.

Contract—Construction—Expressio unius exclusio alterius. Military law. East Africa—Kenya Protectorate.

A company built a bridge in the Protectorate of Kenya. An agreement with the Government of Kenya entitled the company to charge tolls for "(*a*) all passenger vehicles (persons limited to "six) . . . (*d*) foot passengers or persons in excess of six in "number travelling in any vehicle" but provided for exemptions in respect of "military on duty or their equipment baggage or "transport." At the time the only troops in the Protectorate were a local unit, the King's African Rifles, but, after the outbreak of war in 1939, troops from Britain were stationed there. Military vehicles were used to transport soldiers on leave or the families of soldiers across the bridge:—

Held, (1) that the word "military" was not confined to local troops, but included all soldiers of the Queen.

(2) That where a vehicle came within the words of the exemption toll was payable in respect of each person therein not being on

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* *Present*: Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Radcliffe and Lord Cohen.

military duty, except so far as such persons, when added to the number travelling therein on military duty, did not exceed a total of six.

(3) (*Per* Viscount Simonds, Lord Morton of Henryton and Lord Cohen) that when the driver of a vehicle was a soldier performing his military duty in driving it that vehicle was exempt from toll even though all the passengers were persons not on military duty.

Per Lord Reid and Lord Radcliffe (dissenting). A military vehicle conveying persons not on military duty is their transport and not that of its driver and, accordingly, it is not within the exemption even though he is performing his military duty in driving it.

Decision of the Court of Appeal [1956] 1 Q.B. 1; [1955] 1 All E.R. 646 affirmed.

APPEAL from the Court of Appeal (Denning, Morris and Parker L.JJ.).

This was an appeal from an order of the Court of Appeal dated May 2, 1955, allowing an appeal by the Attorney-General, the respondent, from an order of Hilbery J. dated July 28, 1954, whereby judgment was entered in favour of the appellant company, Nyali Ltd., against the respondent for an amount to be ascertained " in respect of tolls for the use of the Nyali Bridge " at Mombasa in the Protectorate of Kenya by members of the " military forces of Her Majesty's Government and their vehicles " (other than the King's African Rifles). . . ." The order of the Court of Appeal directed that the order of Hilbery J. be varied so as to provide that that amount should only be in respect of tolls for the use of the bridge by the military forces of Her Majesty's Government on leave carried in military vehicles and their wives and children, when so carried, in respect of numbers in excess of six carried in any one vehicle.

The facts were stated by Viscount Simonds as follows: By an agreement made on October 9, 1929, between the appellant company and the Government of Kenya Colony and Protectorate it was provided that the company should under the supervision of the Government construct within two years and maintain a bridge (hereinafter called " the Nyali Bridge "), connecting the island of Mombasa with the mainland of Africa.

Clauses 12, 22, 23 and 24 of the agreement were as follows:—

" 12. Upon completion of the bridge the company shall apply " to the Government through the Colonial Secretary for permission to open the bridge to traffic and the bridge shall not be " opened to traffic unless and until the Government through the " Colonial Secretary shall have given such permission in writing.

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" Upon such permission being given the company shall open " the bridge to traffic and subject to the payment of the tolls " hereinafter laid down the bridge shall be kept open to every " vehicle the weight of which when laden is less than five tons " and to all foot passengers and animals Provided that no metal " shod vehicles of any description shall be permitted to use the " bridge except such vehicles as Government may for public " purposes require to take or to be taken across the bridge. The " Government by its duly authorized agents may for public " purposes require the company to allow vehicles the weight of " which when laden does not exceed ten tons to cross the bridge " Provided that while any such vehicle is crossing the bridge " the bridge shall be closed to all other traffic And provided " further that all or any damage of a substantial nature caused " to the decking or structure of the bridge by metal-shod vehicles " taken over the bridge under the provisions of this clause shall " be made good at the expense of the Government."

" 22. Tolls payable by members of the public for crossing the " bridge shall not exceed the following :—

	Shgs.	*Cts.*
" (A) All passenger vehicles (persons limited " to six)	2	00 each.
" (B) Motor bicycles and rickshas		50 each.
" (C) Push bicycles		25 each.
" (D) Foot passengers or persons in excess of " six in number travelling in any " vehicle		10 each.
" (E) Animals		10 each.
" (F) Animals laden		25 each.
" (G) Vehicles for commercial purposes " loaded or empty not exceeding " 1½ tons	2	50 each.
" (H) Vehicles exceeding 1½ tons but not " exceeding 5 tons (limit 5 tons " without permission as in clause " 12)	4	00 each.

" Note : The tolls payable under (A) (B) (C) and (D) shall " cover all baggage goods etcetera conveyed."

" 23. No tolls shall be levied in respect of police or military " on duty or their equipment baggage or transport."

" 24. Tolls payable by Government or Government servants " on duty other than as provided under clause 23 shall be those " specified in clause 22 less twenty-five per centum."

The bridge was duly completed and opened and had been maintained and kept open ever since. At the time of the agreement there was in existence in Kenya Colony and Protectorate only one military unit, the King's African Rifles, a regiment established under the King's African Rifles Ordinance on June 12, 1912. No other similar military formation had been created in the territories of the Kenya Government.

Before the outbreak of the second Great War no difficulties arose in managing the charges in respect of the bridge. But in September, 1939, the tolls received by the company declined owing to the fall in normal traffic and to the fact that most of the lorries in Mombasa were then commandeered for military duty and did not pay tolls. As a result an arrangement, admittedly temporary, was made by which certain payments were made for all Government, police and military traffic without regard to the strict rights of the parties under the agreement. In the meantime the Imperial Army authorities set up a large transit or leave and holiday camp at Nyali which was used by a large number of troops other than the King's African Rifles; and the bridge, which was the only means of passage between the island and the camp, was largely used for purposes of military traffic of all kinds.

In 1948, however, the military authorities of the East Africa Command determined to put an end to the arrangement, claiming exemption from tolls not only under the royal prerogative and the Army Act, with which the House was not concerned, but also under the express provision of clause 23 of the agreement. Eventually, in 1952, the action out of which this appeal arose was brought by the company against the Attorney-General, claiming specifically a declaration that " whether the said camp be " treated as a transit camp or a leave or holiday camp, members " of the military forces of H.M. Government and their vehicles " (other than the military forces and vehicles of the Kenya " Government) are not exempt from liability to tolls chargeable " by the plaintiffs in respect of the said Nyali Bridge."

Charles Russell Q.C. and *Mark Littman* for the appellant company. Three points are relied on: (1) The exemption of " military on duty " relates to and does not go beyond local formations, namely, the military forces and vehicles of the Kenya Government (the King's African Rifles and their vehicles); it does not extend to other military forces of Her Majesty and their vehicles. (2) Alternatively, if the first contention is rejected, so that the word "military" includes all soldiers of the Queen, toll may be charged (*a*) under clause 22 (A) in respect of any vehicle belonging to Her Majesty's forces if the sole purpose of the journey is to transport leave or shopping parties, since it is their transport and not the transport of the driver and therefore does not come within the exemption "military on duty or their transport," and therefore is liable to vehicle toll; (*b*) under clause 22 (D) in respect of each person, not being military on duty, travelling in any vehicle liable to toll under (*a*) except in so far as such persons when added to the number travelling therein who are military on duty do not exceed six; (*c*) under clause 22 (D) at the rate of 10 cents for each person, not being military on duty, travelling in any vehicle of Her Majesty's forces, being a vehicle not adjudged liable to toll. (3) In the further alternative, if it be held that a leave or shopping truck is saved from vehicle toll by the presence of the driver, on the ground that the fact that the driver is on military duty is sufficient to exempt it, nevertheless all the people in it are subject to the 10 cent toll if they are not military on duty.

As to the first point, the expression "Government servants" in clause 24 shows that the "police or military on duty" exempted in clause 23 must be police or military who are Government servants. This expression is proper and appropriate only to the King's African Rifles, the only military formation created in 1912 or since in the territories of Kenya. The wording of the King's African Rifles Ordinance, 1912 (an East Africa Protectorate Ordinance, No. 15 of 1912), suggests that civil servants, police and King's African Rifles can be similarly regarded as servants of the local government. The agreement must be construed in the light of the state of things existing when it was entered into. The reference to the Army Act in Part III of the Ordinance does not carry the matter any further either way.

All the benefits under the agreement are for the local government, which is a party to it, and is throughout referred to therein as "the Government." There is no reference to the United Kingdom Government as such.

In different contexts and different places the word "military" may have a different scope. At its widest it means the organized fighting forces of civilized States, but it may be limited. The reference to the police is to the local police, and the "duty" referred to is peculiarly associated with the local government. Clause 24 clinches the matter. The expression "Government servants on duty other than as provided under clause 23" takes

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in all clause 23 and supports the argument that in clause 23 "military" is used in the sense of association with the local forces. Police from the United Kingdom would not be exempted. The exemption does not include UNO forces or NATO forces or United States forces and there is no justification for the half-way house of "the soldiers of the Queen": see Halsbury's Laws of England, 3rd ed., p. 651, para. 1400.

Privileges are conferred on the Kenya Government as such by clause 24, designed solely to relieve it of part of the financial burden which would otherwise fall on it in that the expenses on duty of the persons mentioned in clause 24 are borne by it. Without clear language to that effect clause 23 should not be construed as containing in part exemption from tolls of persons whose expenses on duty are not the financial concern of the Kenya Government as such. Not only does clause 23 lack clear language to that effect, but, on the contrary, one class (the police) is admittedly limited to those associated with the Kenya Government, which tends to show that the other class (the military), which is dealt with in the same clause in the same way, is similarly limited. The use in clause 24 of the phrase "other "than as provided under clause 23," instead of the simpler and shorter phrase "other than police," indicates that "military" was used by the parties in clause 23 in the limited sense. In all other instances in clauses 23 and 24 in which "on duty" is referred to, it is associated with the Kenya Government as such and should be regarded as used in the same, or substantially the same, way in connexion with "military." It is clear that there must in the context be some limitation on the word "military." The limiting context indicates military associated with the Kenya Government as the party to the agreement and as the entity intended by the agreement to be financially benefited by the exemption. The benefits under these clauses are purely financial. Any doubt on the scope and construction of the exemption clause should be resolved in the sense most favourable to the appellant, it having been introduced at the instance of the other party to the contract. In the Court of Appeal Denning L.J.[1] ignored the circumstances and the context and the financial considerations which were the reason for the exemption.

As to the second main point (the tolls payable on the assumption that "military" includes all soldiers of the Queen), a truck carrying leave and shopping parties has the object of transporting non-duty people. In clause 23 " their . . . transport " is used in a functional sense and the question is always what is the function of the truck. In the case of leave and shopping parties travelling in a military vehicle there is no exemption for either the vehicle or the passengers, because they are not " military on duty " and the vehicle is " their . . . transport." The view that the function of the driver in charge of the truck determines the matter against the appellant is wrong. It would be very extraordinary if persons on shopping expeditions were exempt. Unless it can be said that the function of the vehicle, in whole or in part, is the transport of military on duty, the vehicle is not within the exemption.

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[1] [1956] 1 Q.B. 1, 18–19; [1955] 1 All E.R. 646.

As to the third main point (the tolls payable on the assumption that the presence of a driver on duty saves vehicles with leave or shopping parties from vehicle toll), on the true construction of the agreement, toll is payable on every person not on military duty. There is a cross-reference between clause 22 (A) and (D). The words " in excess of six in number " in the latter point back to the former. Accordingly, persons travelling in a vehicle are only exempt from toll if the vehicle has paid toll. That is implicit in the language of clause 22. The obvious intention is to provide that where vehicle toll is payable six persons can be carried free, but that where no vehicle toll is payable no persons are carried free. The words " in excess of six in number " is qualified as if there were added the words " not franked by vehicle toll payment " under (A)."

Alternatively, this situation presents a casus omissus and, if no amount is specified, a reasonable toll is payable: see *per* Denning L.J. in the Court of Appeal,[2] where he cited *Stamford Corporation* v. *Pawlett*.[3] The leave and shopping parties are, in this view, members of the public and must pay toll unless there is some exemption covering them. There is no exemption and they must therefore pay a reasonable sum.

Mark Littman following. As to the position of leave parties, see *Attorney-General* v. *Company of Proprietors of Selby Bridge*,[4] which indicates that, if the sole function of a vehicle is to carry persons not on duty, there may be no exemption from toll. The functional approach is the right one.

The Oxford English Dictionary defines " military " as " soldiery; soldiers generally," but this construction must give way to the intention of the parties to be collected from the rest of the document and the surrounding circumstances. The parties were thinking not in Commonwealth terms but in local terms. There is no reference in the agreement to the Navy or the Air Force because there is no local Navy or Air Force in Kenya.

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[2] [1956] 1 Q.B. 1, 20.

[3] (1830) 1 C. & J. 57, 80; (1831) 1 C. & J. 400.

[4] [1921] 1 K.B. 149; 36 T.L.R. 848.

[VISCOUNT SIMONDS intimated that their Lordships did not require to hear argument from the respondent on the scope of the word " military " in the agreement.]

John Megaw Q.C. and *Rodger Winn* for the respondent. On the appellant's second point, the correct construction of " their " . . . transport " gives " their " in clause 23 its possessive meaning. It relates back to " police or military " and not to " police or military on duty," so that every military vehicle is exempt, irrespective of the driver or of the object of the journey. The exemptions cover military on duty and military transport.

The following propositions are submitted: (1) " Their " in clause 23 must mean " his or their " according to whether the military on duty, whose transport is in question, is one person or more than one person, assuming, contrary to the earlier contention, that " their " relates to " military on duty " and not simply to " military." (2) If the driver is on duty with no passengers, the vehicle is " his transport." The only person whose transport it can be is the driver in charge in the course of his military duty. (3) The driver is just as much " military on duty " as a soldier who is travelling with him on some duty other than the driving of the vehicle. The vehicle would still be transport of military on duty even if there were civilians also aboard. (4) If a man is detailed to drive a vehicle to carry baggage, the vehicle is still the driver's vehicle and transport. (5) It makes no difference whether the baggage is that of military men or of civilians. (6) It is none the less the driver's transport because, instead of civilian baggage, it is carrying civilian bodies. (7) Even if the vehicle can in one sense be called the civilians' transport, because it is transporting them, that does not prevent it from being also the driver's transport. (8) When a driver on duty is carrying civilian passengers it is more correctly described as the driver's transport than as the civilians' transport.

Thus a leave or shopping vehicle is exempt from toll because the driver is on duty and gives his character to it, since, if he is on duty, the vehicle is on duty. Even if " their transport " in clause 23 relates to " military on duty," the driver is on duty and the vehicle is his transport.

As to the appellant's third point, the words " in any vehicle " in clause 22 (D) mean " in any vehicle " and not " in any vehicle "which has paid vehicle toll." Clause 24 and the 25 per cent. reduction there specified supports this. The words in clause 22 (D) take in toll-free military vehicles. In such vehicles toll is chargeable in respect of every person not on duty in excess of six. The words "subject to the payment of the tolls" in clause 12 indicate that, apart from the specific tolls laid down, the bridge is to be kept open, i.e., vehicles shall be allowed to pass. To imply that tolls can be charged other than those laid down would contradict the clear words of clause 12. Neither of the authorities cited by Denning L.J. in the Court of Appeal[5] are authority for saying that where certain tolls are fixed the court can fix other tolls.

It is admitted by the respondent that where a vehicle crosses the bridge with a military driver and therefore comes within the exception of clause 23, and it carries more than five passengers, every passenger over the first five who is not on military duty is liable to pay the toll prescribed under clause 22 (D), the military passengers being counted first.

Rodger Winn following. In construing these clauses one is construing the extent of a grant given by clause 12 to the extent of "the tolls hereafter laid down." There are three categories of users of the bridge, (*a*) "members of the public" referred to in clause 22; (*b*) police and military (clause 23), and (*c*) other Government servants (clause 24), each regarded differently. Clause 12 shows no general purpose to charge toll and so there can be no question ever of charging a reasonable toll. Clause 22 must mean that toll is payable when "members of the public" drive vehicles over the bridge. If the driver of a vehicle is not a "member of the public," he is not within clause 22, nor is his vehicle.

Charles Russell Q.C. in reply. It cannot be that any transport carrying a policeman or a soldier on duty is exempt, because that would exempt any public motor-bus carrying a policeman or a soldier on duty.

The attempted distinction between members of the public and police and military, if sound, would make the exemption in clause 23 unnecessary, but they are members of the public and there is a positive charge on them in clause 22. Further, there is a general right to charge toll. The reduction of toll for Government servants in clause 24 does not destroy the point that "in "any vehicle" in clause 22 (D) means "in any vehicle which "has paid vehicle toll." In a clause 24 case the franking by payment of toll must be proportional, since a clause 24 vehicle is not within the category of vehicle which has paid no toll at all. As to the question whose transport a particular vehicle is, this must be found in a functional sense. A leave bus goes over full and returns empty with only the driver. There is toll payable on the first occasion because it is the transport of men not on duty, but toll is not payable on the return because it is then the driver's transport and is not transporting anyone else.

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[5] [1956] 1 Q.B. 1, 20.

Their Lordships took time for consideration.

June 8. Viscount Simonds. My Lords, the issues in this case now turn on the meaning and effect of a very few words in an agreement made on October 9, 1929, between the appellant company and the Government of Kenya Colony and Protectorate. I say " now turn," because questions of interest and importance arising on the nature and scope of the royal prerogative and on the meaning of section 143 of the Army Act, which were discussed in the courts below, have not been raised in this appeal.

[His Lordship stated the facts and continued:] As the case has developed, three main questions on the scope of the exempting provisions have emerged. The first and most important is whether the expression " military " in clause 23 is confined to the King's African Rifles or, I suppose, to any troops locally raised in the same way that that unit was raised under the provisions of a local ordinance. Upon this question the Court of Appeal was unanimously in favour of the respondent, and I agree with that decision. The words " military on duty " are wide enough in their natural meaning to include all the armed forces of the Crown and, though the royal prerogative is not relied on as per se a ground of exemption, it is legitimate in construing the agreement to observe that it would be a strange thing to give a limiting meaning to the words " the military " so as to give the subject the right to demand of the Queen a toll for the passage of her armed forces. The terms of clause 24 were relied on as showing that " the military " were being treated as Government servants, and that the only military who could be so treated were the King's African Rifles. It is true that the terms of enlistment under the Police Ordinance (Laws of Kenya, chapter 36) were in many respects, in particular in respect of the oath of allegiance, similar to those of the King's African Rifles Ordinance, but that does not diminish the force of the argument, which prevailed with Morris and Parker L.JJ., that ample content is found for clause 24 if the police are for this purpose regarded, as, in my opinion, they should be regarded, as "Government servants."

The second question is one of far greater difficulty and complexity. Indeed, in a certain view I see no end to its complexity. It turns on the meaning of the words "military "on duty or their equipment baggage or transport." An example will indicate the problem. A military driver is ordered by his commanding officer to take a party of soldiers on leave in an army vehicle from the camp to the island or from the island to the camp. In either case the vehicle must cross the bridge. Is a toll payable under clause 22 (A) of the agreement? "Yes," says the appellant company, because the soldiers on leave are not "military on duty" and the vehicle is "their transport." "No" says the respondent, because the driver is a soldier on duty and (in the words of Denning L.J.[1]) "The driver is the "person who gives the character to the vehicle. If he is on "duty, the vehicle is on duty"; or (as Parker L.J. said [2]) because "where the only person on duty is the driver, I should have "thought that the vehicle was transporting him notwithstanding "that he was the driver and that, accordingly, the vehicle could "properly be described as his transport." There are other and slightly different answers that may be given and I return to them. But the complexity of the question may be seen from the fact that counsel for the company admitted that, if the military driver had carried one soldier on duty in addition to a party of soldiers on leave, no toll would be payable, and he admitted too that, if the driver brought back the vehicle empty, again no toll would be payable. I think that he did not concede that the carriage of a soldier whose duty it was to guard the vehicle would be sufficient to leaven the lump of non-duty men and so provide exemption.

My Lords, undoubtedly the word "their" in the expression "their transport" cannot be read in the possessive sense, if "transport" refers to the material thing, the vehicle. For the vehicle is not their property, nor is their equipment their property nor is their baggage in the sense in which I think that word is used here. It is obviously a somewhat loose expression. It does not help much to substitute the phrase "the means by "which they are transported," for this, though it gets away from the idea of possession or ownership, still leaves open the question whose transport it is when it is driven by a soldier on duty and carries a mixed party of soldiers on duty and soldiers on leave, or carries military stores and soldiers on leave, or carries no one except the driver or carries only soldiers on leave.

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[1] [1956] 1 Q.B. 1, 19; [1955] 1 All E.R. 646.

[2] [1956] 1 Q.B. 1, 31.

My Lords, my own view, which has the merit of simplicity and of enabling the agreement to be easily worked without any consideration of the problems that I have mentioned and many others, is that a military vehicle is the transport of military on duty when it is being used for a military purpose. This is in effect what is meant by Denning L.J.'s words[3]: "The vehicle "is, so to speak, on duty, and it is exempt, no matter whether "it is carrying baggage, stores or men." I do not think that it carries the matter any further, or indeed carries it any way at all, to ask what is the purpose for which the vehicle is being used, as soon as it is established that it is being used for the purpose for which the military authority has ordered its use, that is, for the performance of a military duty. And I would venture to add, with great respect to those who take a different view, that this seems to me the plain commonsense of the matter. For it may be as much a part of the ordinary military routine and organization to carry troops on leave to and from a particular place as to carry soldiers for sentry or other outpost duty. Upon this question, therefore, I conclude by saying that a military vehicle does not pay toll if it is being used for a military purpose, that is, when the driver is a soldier who is performing his military duty by driving it.

The next question assumes that the vehicle is exempted and asks what tolls are payable in respect of any and how many passengers who are not themselves military on duty. Upon this question there was a difference of opinion in the Court of Appeal, the majority holding that a toll of 10 cents per person was payable in respect of any person not on military duty in excess of six persons, but Denning L.J. holding that a reasonable toll ought to be paid in respect of every person not on military duty whether or not in excess of six.

My Lords, I do not think that this is an altogether easy question, but I favour the view of the majority of the Court of Appeal. Counsel for the appellant in the first place relied, not so much on the view of Denning L.J. that here was a casus omissus and a reasonable toll must be paid, as on the argument that on its true construction the agreement provided for a levy of a toll of 10 cents on every person not on military duty. But I find nothing in the agreement to support this construction. The toll chargeable in respect of persons carried in vehicles is to be found only in clause 22 (D) and it is only "persons in excess of "six in number travelling in any vehicle" who are charged. It is not possible to read into this charging clause some such words as "but if the vehicle is itself exempted from toll, then every "person travelling in that vehicle." It is contended or conceded by the respondent that the words "in any vehicle" include a military vehicle which is itself toll-free and that a toll is chargeable in respect of every person not on duty in excess of six. I think that this is the fair and literal meaning of the clause and that no valid reason can be found for limiting the meaning of the words "in any vehicle."

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[3] [1956] 1 Q.B. 1, 19.

Denning L.J. did not accept this view. He thought that there was no provision apt to cover the case of persons not on military duty who were carried in a toll-free car, that there was a casus omissus and that therefore all such persons should pay a reasonable toll. If your Lordships take the view, as I do, that express provision is made for such persons in excess of six paying the prescribed toll of 10 cents, you cannot, I think, conclude that there is a casus omissus for which provision should be made. The maxim "Expressio unius" would clearly apply. But I must express my dissent from the view that, if there is such a casus omissus, the gap can be filled in this way. In my opinion clause 12 provides a conclusive answer to such a claim. The obligation is thereby laid on the company to open the bridge to traffic "and subject to the payment of the tolls hereinafter laid "down" to keep it open to every vehicle as therein described and to all foot passengers and animals. The bargain is made and the tolls prescribed. So far as they are not prescribed, passage over the bridge is open and free. I cast no doubt upon the authority of such cases as *Stamford Corporation* v. *Pawlett*,[4] which the learned Lord Justice cited. The grant of a franchise of a fair or market "cum omnibus tolnetis pertinentibus et "spectantibus" must carry a right to levy a reasonable toll though the amount of toll is not specified. But that is no authority for saying that, where the franchise is the subject of an agreement, in which the tolls chargeable are specified with

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[4] (1830) 1 C. & J. 57.

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particularity, some other toll is also chargeable. This contention on behalf of the appellants must also, therefore, be rejected.

On the whole case I am of opinion and move that the appeal be dismissed with costs.

Lord Morton of Henryton. My Lords, I agree with the speech which has just been delivered by my noble and learned friend on the Woolsack, and I do not desire to add any observations of my own.

Lord Reid. My Lords, this case turns on the true construction of clause 23 of the agreement made on October 9, 1929, between the appellants and the Kenya Government under which the appellants constructed a bridge connecting the island of Mombasa with the mainland, and were authorized to charge certain tolls. Clause 22 sets out a table of tolls, including (A) all passenger vehicles (persons limited to six) 2 shillings each, and (D) foot passengers or persons in excess of six in number travelling in any vehicle 10 cents each. Clause 23 provides: " No tolls " shall be levied in respect of police or military on duty or their " equipment baggage or transport." Clause 24 provides for a reduction of 25 per cent. on tolls payable by Government or Government servants on duty other than as provided under clause 23. I do not think that any other clause in the agreement need be considered.

Circumstances have altered greatly since the agreement was made, and it is not surprising that difficult questions have arisen in applying the terms of the agreement to the new situation. It is said that in 1929 the only military in the area were the King's African Rifles and that for various reasons the word " military " in clause 23 only applies to that regiment. But I agree with your Lordships in rejecting that argument.

I find much more substance in the appellants' alternative argument. Much of the traffic which now crosses the bridge consists of military vehicles driven by a military driver on duty but conveying either members of the forces on leave or parties of civilians, generally soldiers' families, for such purposes as shopping. The appellants maintain that in such cases neither the vehicle nor the passengers are exempted from toll by clause 23.

The respondents' first answer to this argument is that the words " their equipment baggage or transport " refer only to the words " police or military " and not to " police or military "on duty." This means that every military vehicle would be exempt no matter who was driving it or what was the purpose of its journey. I cannot accept that argument: the structure of the sentence appears to me to be against it. It would have been easy to say "police or military on duty or police or military "equipment baggage or transport" if that had been intended. In my judgment, the word "their" refers to "military on duty": their equipment and baggage means equipment and baggage which is being taken for the use of military on duty or which they are taking with them, and their transport means the transport which is conveying them. Military on duty do not own and generally do not even possess "their" equipment, baggage or transport; but things being used by people are commonly called "their" things without regard to legal ownership or possession, and these clauses are not drafted in the language of conveyancers.

Then the respondents say that, even if that be so, the drivers of the vehicles are on duty and the vehicles are "their" transport and therefore exempt from toll. It is true that the drivers are in charge of the vehicles which they are driving, and the vehicles might well be said to be their vehicles while they are in charge. But are the vehicles "their transport"? It appears to me that when a vehicle is sent out with a driver to convey passengers to their destination it would commonly be said that the vehicle is the passengers' transport. So, where a vehicle and driver are provided to transport a shopping party across the bridge to Mombasa, it appears to me more natural to say that the vehicle is their transport than to say that it is not their transport but is the transport of the driver. The driver is only there to transport the passengers. And if that be so, then I am of opinion that a vehicle on such a journey does not come within the exemption under clause 23. And, as it is admitted that men on leave are not "military on duty," the same applies to vehicles conveying men on leave.

A military vehicle may be conveying passengers of whom some are military on duty and some are not, or it may not be conveying any passengers at all. I do not think it necessary to deal with such cases because the appellants admit that no tolls are payable in respect of the vehicles in such cases. I would allow the appeal to the extent of allowing the appellants to recover toll in respect of military vehicles carrying passengers none of whom are military on duty, and also in respect of persons in excess of six in number travelling in such vehicles.

If I am wrong in so holding, then the question arises whether all passengers in such vehicles who are not military on duty must pay 10 cents each or whether the first five passengers go free. The only power to charge passengers is under head (D) of clause 22: it is quite clear—"persons in excess of six in number travel- "ling in any vehicle." I cannot read this as meaning all persons not themselves exempt who are travelling in a vehicle which is exempt from toll. This means that a certain number of persons who would have had to pay 10 cents each if they had crossed the bridge on foot do not have to pay if they cross as passengers in a vehicle which is exempt. When the vehicle pays toll that toll includes the toll of the driver and five passengers, but if the vehicle does not pay toll then nothing is paid in respect of these non-exempt passengers. The illogicality of this result goes some way to strengthen my opinion that the vehicle itself is not exempt when carrying persons who are not military on duty.

LORD RADCLIFFE. My Lords, I agree with the opinion that has been expressed by my noble and learned friend, Lord Reid, and the conclusion to which he comes, and I will not take up much time in explaining why I prefer it to any alternative view.

We have to construe an agreement made in 1929 which is plainly not a very skilled piece of draftsmanship. Even so, it would have taken a prophet as well as a master in the draftsman's art to provide completely for all the combinations and complications which can present themselves nowadays, owing to the installation at Nyali of the leave camp for soldiers and, it seems, for members of their families. We have, therefore, to make the best sense we can of the effect of the toll clauses, so far as a fair reading of the words will allow. No reading of them, I think, escapes difficulties under certain conditions and some produce absurdities. The arguments to which your Lordships listened during the course of the hearing showed at least how much verbal ingenuity can be brought to bear on these brief phrases, whether the result is to elucidate or to obscure their real meaning.

For myself, I find it best to start with the fact that clause 22 of the agreement provides what is intended to be a general tariff to be paid by persons using the bridge, with variations of charge according to the circumstance of their using it as foot passengers or as persons conveyed or accompanied by transport. When the following clause says that "no tolls shall be levied "in respect of police or military on duty or their equipment "baggage or transport," I take it to be fairly clear that an exception is being made for police or military on duty on any occasion when they are users of the bridge and for the equipment, baggage or transport that conveys or accompanies the persons so exempted.

If we now take the case that has caused difficulty, the leave or shopping parties, I think it useful to see how the toll charges fall. No one suggests that the members of the party are themselves " military on duty." If they approach the bridge on foot and walk over it, therefore, they are clearly chargeable for their use of the facility. If they approach on a motor bicycle or a push bicycle or in a ricksha or on a donkey, the same result follows according to the appropriate tariff. They have used the bridge, they are not on duty, and they must pay for the use at the rate prescribed for their particular means of transport. But if they approach and cross the bridge in or on another form of transport, namely, a lorry provided for their benefit with a military driver on duty, a most remarkable change comes about in the toll situation, if the respondent's argument is right. The vehicle uses the bridge without payment, though it has no purpose in crossing the bridge except to convey the leave or shopping party. More remarkable still, an unidentifiable group of the passengers up to the number of five becomes similarly exempt from payments, although no one knows which ones they are, and the purpose of the whole party in using the bridge remains exactly the same as it would be if they were walking or bicycling over it and so liable to toll.

My Lords, I hope that I shall not be thought captious if I say that I do not regard this as a very happy result of construing the agreement. And I think that it overrates the merits of this construction to say that it is the simple one. The question is whether the wording employed does actually require it. In my opinion, not only does it not require it, but this odd result is only produced because in the respondent's argument a strained and unnatural meaning is given to the words " their . . . transport " in clause 23. In this context " their " is not used strictly in any possessive sense, but it is used in the attributive sense as attributing the transport to the military on duty whose actual crossing of the bridge raises the question of toll. In that context it seems to me quite unreal to attribute the vehicle to the driver of it whose job it is to convey the party of leave men or shoppers over the bridge, rather than to the party themselves. On such occasions it is their transport, since it is their purposes, not his, that it serves in crossing the bridge. And the test that the agreement provides for deciding whether military users are to pay toll or not is whether, as users, they are crossing in pursuance of military duty. What is that but to charge them according to their purpose? Of course, the driver himself is on duty when he drives the party over the bridge. But if I tell my chauffeur to drive me on a journey I should be very surprised to be told that in doing so he is pursuing his purposes to the exclusion of mine. And, if you please, the vehicle is "on duty." But the agreement does not deal with vehicles on duty. It deals with vehicles that are attributed to persons who are, or are not, themselves on duty.

In my opinion, therefore, exemption from toll depends on the purpose for which the journey is made by the military conveyed by the vehicle, and in the simple case of driver and off-duty party I think that it is their purpose alone that matters. I have no doubt at all that a vehicle containing a number of military, some on and some off duty, would present a problem which the agreement provides no explicit means of solving. It would have to be solved, if at all, by some rough and ready determination of the main purpose of the journey. But the fact that the agreement has not been so framed as to take care of these various complications which may arise does not present itself to me as a good enough reason for giving to it what seems so strained a meaning in the main set of circumstances that we are asked to consider.

LORD COHEN. My Lords, the dispute between the parties is as to the extent of the right of the appellants to tolls on traffic crossing the Nyali Bridge between the mainland of Kenya and Mombasa Island and as to the scope of the exemption from tolls provided for by clause 23 of the agreement dated October 9, 1929, between the appellants and the Government of Kenya Colony and Protectorate. That clause provides that no tolls shall be levied in respect of police or military on duty or their equipment, baggage or transport.

The appellants claim that (1) this exemption covers only the military forces and vehicles of the Kenya Government (that is, the King's African Rifles and their vehicles) and does not extend to other military forces of Her Majesty and their vehicles.

If this claim is rejected, the appellants claim in the alternative (2) (a) toll under clause 22 (A) of the agreement in respect of any vehicle belonging to Her Majesty's forces crossing Nyali Bridge if the sole purpose of the vehicle's journey is the transport of, what were called in the course of the argument for convenience, leave and shopping parties; (b) toll under clause 22 (D) in respect of each person not being military on duty travelling in any vehicle adjudged liable to toll under (a) except in so far as such persons when added to the number travelling thereon who are military on duty do not exceed a total of six; (c) toll at the rate of 10 cents for each person not being military on duty travelling in any vehicle of Her Majesty's military forces crossing Nyali Bridge, being a vehicle not adjudged liable to toll under (a) above.

In the further alternative the appellants claim (3) that if your Lordships should be of opinion that the fact that the driver of a vehicle is on military duty is sufficient in all cases to exempt the vehicle from toll, none the less toll is payable at the rate of 10 cents for each person not being military on duty travelling in any vehicle of Her Majesty's forces crossing Nyali Bridge.

The trial judge accepted the first claim, but this was rejected by the Court of Appeal. I find myself in such complete agreement with the reasons given by the Court of Appeal and by your Lordships for rejecting this claim that I will not add any reasons of my own for reaching this conclusion.

I am also in agreement with the decision of the Court of Appeal on the other issues between the parties, but as there is some difference of opinion among your Lordships on those issues I must state shortly my reasons for my conclusion.

Claim 2 (a) is based on the argument that if the only military on duty in the vehicle are the driver and the guard carried for the purpose of protecting the vehicle, the vehicle is the transport of the leave and shopping party and not of military on duty. I am unable to accede to this argument. Mr. Russell felt bound to admit that if the vehicle was returning empty after depositing the leave and shopping party, toll would not be payable on the vehicle under clause 22 (A). I think he was bound to make this admission, but, if so, it could only be because the vehicle was the transport of military on duty. I agree with Parker L.J. who, when dealing with the argument of the respondent that where a military vehicle has been detailed by the military authorities to cross the bridge in charge of a military driver on duty, neither the driver nor the vehicle is chargeable, said[5]: "I agree with "Hilbery J., who said: 'I think that the right way to read it "'here is that it is an exemption, as it says, of military on "'duty or that which is going with the military on duty, the "'transport, and that the transport in such a case is going with "'a driver on military duty, and I think in those circumstances

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[5] [1956] 1 Q.B. 1, 31.

" 'it would be exempt.' When one or more (apart from the " driver) of those carried are on duty, then the vehicle is clearly " 'their transport' notwithstanding that others in the vehicle " may be on leave. Further, where the only person on duty is " the driver, I should have thought that the vehicle was transporting him notwithstanding that he was the driver and that, " accordingly, the vehicle could properly be described as his " transport."

I would only add that, as I read clause 23 of the agreement, " their . . . transport " means transport provided by the police or military authority, as the case may be, for the transport of the police or military on duty. The driver in the class of cases your Lordships are considering was clearly military on duty, and it seems to me that the vehicle he was driving was none the less his transport because he was the human agency by which the same vehicle could be used for the transport of others.

As regards claim 2 (b), in so far as it was based on the vehicle being liable to toll, it must fail, since for the reasons I have given, I agree with the Court of Appeal that no toll is payable in respect of the vehicle. But I agree with the Court of Appeal that for the reasons they give the appellants are entitled under clause 22 (D) to toll at the rate of 10 cents for each person, not being military on duty, travelling in any vehicle except so far as such persons when added to the number travelling thereon who are military on duty do not exceed a total of six.

I need not deal separately with claim 2 (c) since, in my opinion, the reasons I shall give for rejecting claim 3 are equally fatal to claim 2 (c).

Claim 3 is based on two arguments. First, it is said that paragraphs (A) and (D) of clause 22 of the agreement are interrelated, that the words " in excess of six in number " in paragraph (D) clearly point back to paragraph (A) and that, therefore, persons travelling in a vehicle are only exempt from toll if the vehicle has paid toll under paragraph (A). I am unable to accept this argument. It seems to me to disregard the plain meaning of the words used and to require a complete rewriting of paragraph (D) so as to make it read: " (D) Foot passengers or persons " travelling in any vehicle provided that if the vehicle has paid " toll under (A) toll under this paragraph shall only be paid on " the number of persons so travelling in excess of six." I see no justification for such a rewriting. In my opinion, the duty of the toll collector is to look at the traffic approaching the bridge. If he sees a vehicle containing passengers, he must count the people in it, and if the number of them exceeds six he can claim toll only on any excess over six persons.

Alternatively, Mr. Russell relied on the argument which found favour with Denning L.J. in the Court of Appeal but not with the other members of the court. Denning L.J. thought that the liability of leave men and wives to pay toll did not arise only under clause 22 (D) of the agreement. In his view these people are members of the public crossing the bridge and must, therefore, pay toll unless they can point to some exemption and there is no exemption covering them. Therefore, in accordance with general principle, there being no rate specified, they must pay a reasonable sum to be determined by the court. He referred in support of this view to *Stamford Corporation* v. *Pawlett.*[6]

I do not doubt that if there were a general power to charge tolls but no rate was specified in the instrument granting that power, the rate must be a reasonable one to be determined in case of dispute by the court, but I am unable to trace in the agreement of October 9, 1929, any such general power. The right to tolls arises from clause 12 of that document, which provides: "Subject to the payment of the tolls hereinafter laid down the "bridge shall be kept open to every vehicle the weight of which "when laden is less than five tons and to all foot passengers and "animals." As I read the document, the tolls thereinafter laid down are the tolls for which maxima are fixed by clause 22 subject to such exemption and partial relief as are granted under clauses 23 and 24. Clause 22 goes into considerable detail, and it does not include any class wide enough to cover the first six persons in any vehicle. It seems to me that they constitute, as Parker L.J. says, a casus omissus, and I do not think it is justifiable to fill the gap by reading into clause 12 a general power to charge tolls, thus treating clause 22 not as an enabling clause but as a limitation in certain cases on a general power.

For these reasons I would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Travers Smith, Braithwaite & Co.; Treasury Solicitor.*

F. C.

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[6] 1 C. & J. 57, 80.

J. C.*

1957
March 19.

CHARLES MARSHALL PROPRIETARY LTD. APPELLANT;

AND

GERALD ALEXANDER COLLINS . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—State Act—Validity—Industrial dispute—Long service leave—Whether State Act "inconsistent" with Commonwealth award—"Field" of long service leave not covered by award—No inconsistency—State Act valid—Factories and Shops (Long Service Leave) Act, 1953 (*Victoria*), *ss.* 7, 9—*Conciliation and Arbitration Act*, 1904–1952 (*No.* 13 *of* 1904–*No.* 34 *of* 1952) (*Commonwealth*), *ss.* 13, 25—*Metal Trades Award*, 1952—*Commonwealth of Australia Constitution Act*, 1900 (63 *&* 64 *Vict. c.* 12), *s.* 109.

The Factories and Shops (Long Service Leave) Act, 1953, of the State of Victoria, which imposes upon employers the obligation to grant their employees 13 weeks' long service leave with pay after 20 years of continuous service and, in certain cases, leave pro rata for shorter periods of service, is intra vires and valid. "Long "service leave" is a separate item in industrial relations and is an entirely distinct subject-matter and differs in kind from basic wages, hours of work, holidays and annual leave, etc., which are determined and regulated by the Metal Trades Award, 1952, made under the Commonwealth Conciliation and Arbitration Act, 1904–1952, the award itself being admittedly a part of the law of the Commonwealth. There are no grounds in principle or authority for construing the award as covering the "field" of long service leave, of which it makes no mention, and accordingly no inconsistency between the State Act and the award within section 109 of the Commonwealth Constitution, which provides that in the case of inconsistency between a State and a Commonwealth law the former shall, "to the extent of the inconsistency, be invalid."

Clyde Engineering Co. Ltd. v. *Cowburn* (1926) 37 C.L.R. 466 and *Colvin* v. *Bradley Brothers Pty. Ltd.* (1943) 68 C.L.R. 151 distinguished.

Judgment of the High Court of Australia (1955) 92 C.L.R. 529 affirmed.

APPEAL (No. 21 of 1956), by special leave, from a judgment of the High Court of Australia (August 11, 1955).

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The issue in the appeal was whether an Act of the State of Victoria, The Factories and

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD COHEN and LORD SOMERVELL OF HARROW.

Shops (Long Service Leave) Act, 1953 (hereinafter called the State Act), was inconsistent with a law of the Commonwealth and therefore invalid to the extent of the inconsistency under section 109 of the Constitution. The provisions of the Commonwealth law which were alleged to create the inconsistency were contained in the Metal Trades Award, 1952, made by a conciliation commissioner under the Commonwealth Conciliation and Arbitration Act, 1904–1952. Both parties accepted the position, as found by the High Court, that the provisions of the award were by the terms of the Conciliation and Arbitration Act brought into force as part of the law of the Commonwealth for the purposes of section 109.

Sections 7 and 9, which were the main operative sections of the State Act, were as follows:—

" 7. (1) Subject to this Act every worker shall be entitled " to long service leave on ordinary pay in respect of continuous " employment with one and the same employer.

" (2) The amount of such entitlement shall be—(*a*) on the " completion by a worker of twenty years' continuous employ" ment with his employer—thirteen weeks' long service leave " and thereafter an additional three and a quarter weeks' long " service leave on the completion of each additional five years " of continuous employment with such employer; (*b*) in addition, " in the case of a worker who has completed more than twenty " years' continuous employment with his employer and whose " employment is terminated—(i) by the employer for any cause " other than serious and wilful misconduct; or (ii) by the worker " on account of illness incapacity or domestic or any other press" ing necessity where such illness incapacity or necessity is of " such nature as to justify such termination—such amount of long " service leave as equals one-eightieth of the period of his con" tinuous employment since the last accrual of entitlement to " long service leave under paragraph (*a*) of this subsection; " (*c*) in the case of a worker who has completed at least ten but " less than twenty years of continuous employment with his " employer and whose employment is terminated—(i) by the " employer for any cause other than serious and wilful mis" conduct; or (ii) by the worker on account of illness incapacity " or domestic or any other pressing necessity where such illness " incapacity or necessity is of such nature as to justify such " termination—such amount of long service leave as equals one" eightieth of the period of his continuous employment."

" 9. (1) When a worker becomes entitled to long service "leave under this Act such leave shall be granted by the employer "as soon as practicable (but save as otherwise expressly pro-"vided in this section not before the thirty-first day of December "One thousand nine hundred and fifty-four) having regard to "the needs of his establishment; but subject to this Act—(*a*) the "taking of such leave may be postponed to such date as is "mutually agreed or in default of agreement as the Industrial "Appeals Court having regard to the problems involved directs "but no such direction shall require such long service leave to "commence before the expiry of six months from the date of "such direction; (*b*) the taking of such leave may (if the entitle-"ment has accrued) be advanced to such date before the thirty-"first day of December One thousand nine hundred and fifty-"four as is mutually agreed; (*c*) in no case shall any entitlement "to long service leave be lost or in any way affected by the "foregoing provisions of this subsection or by failure or refusal "of the employer to grant the leave.

"(2) Notwithstanding anything in the last preceding sub-"section where the employment of a worker is for any reason "terminated before he takes any long service leave to which "he is entitled or where any long service leave entitlement "accrues to a worker because of the termination of his employ-"ment the worker shall be deemed to have commenced to take "his leave on the date of such termination of employment and "he shall be entitled to be paid by his employer ordinary pay "in respect of such leave accordingly.

"(3) The employer and worker may agree that any accrued "entitlement of long service leave will be taken in two periods; "but save as aforesaid long service leave shall be taken in one "period.

"(4) The ordinary pay of a worker on long service leave shall "be paid to him by the employer when the leave is taken and "shall be paid in one of the following ways:—(*a*) In full when "the worker commences his leave; or (*b*) At the same times as "it would have been paid if the worker were still on duty; in "which case payment shall, if the worker in writing so requires, "be made by cheque posted to a specified address; or (*c*) In any "other way agreed between the employer and the worker—and "the right to receive ordinary pay in respect of such leave shall "accrue accordingly.

"(5) Any long service leave shall be inclusive of any trade or "public holiday occurring during the period when the leave is "taken, but shall not be inclusive of any annual leave occurring "during such period."

Under section 17 (1) (*d*) any person who failed to comply in any respect with any provision of the Act was guilty of an offence.

The appellant was prosecuted at the instance of the respondent, a factory inspector, for not granting a dismissed employee named Kemp pay for a period of long service leave to which he was admittedly entitled under section 7 (2) (*c*) of the State Act if applicable. The Metal Trades Award, 1952, admittedly applied to the appellant and Kemp and it was submitted that it was inconsistent with section 7 (2) (*c*) and therefore rendered it inapplicable to the appellant.

The Metropolitan Industrial Court at Melbourne dismissed the information on the ground of the inconsistency alleged. The respondent appealed to the High Court. The first point taken by the present appellant was that the appeal to the High Court was not competent by reason of the provisions of section 31 of the Conciliation and Arbitration Act. That point failed and the decision on that point was not now challenged. On the point under section 109 the appeal succeeded. The High Court (Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.), holding there was no inconsistency, set aside the order of the Metropolitan Industrial Court and remitted the information to that court for rehearing.

1957. Feb. 18, 19, 20. *D. I. Menzies Q.C.*, *R. M. Eggleston Q.C.* (both of Australia) and *Robert Gatehouse* for the appellant. The Factories and Shops (Long Service Leave) Act, 1953, of Victoria is inconsistent with the Commonwealth Conciliation and Arbitration Act, 1904–1952, and the Metal Trades Award made thereunder, and to the extent of the inconsistency cannot under section 109 of the Commonwealth Constitution, which gives paramountcy to the Commonwealth law, validly apply to employers and employees who are bound by the award, as were both the appellant and its employee Kemp. No section of the State Act could apply to any person bound by the award.

There are five matters of common ground. (1) This appeal does not give rise to an inter se question. (2) There are two aspects or tests of inconsistency, (i) "general" inconsistency, which arises when the Commonwealth law upon its proper construction is exhaustive or exclusive or covers the field, so that there is no room left for any State law on that subject, and

(ii) "particular" inconsistency, which is when the Commonwealth law makes one provision and the State law makes a different provision, so that there is a contradiction between the two. (3) The way in which section 109 of the Constitution operates when the Commonwealth law in question is the Arbitration Act and an award made thereunder—the award is then part of the law of the Commonwealth for the purposes of section 109. (4) It is also common ground that this State Act is valid except to the extent, if any, that it is invalidated by section 109. No question arises as to the power of the Parliament of Victoria to enact the Act. (5) The award and that part of the Arbitration Act which gives it binding force is also valid.

In this case there is both general and particular inconsistency. The Commonwealth law is an exhaustive statement of the industrial relationship of the employers and employees, and there is no room for any State law affecting industrial relationship. Put in a somewhat narrower way, the Commonwealth law is an exhaustive statement of the industrial relationship of those bound thereby, at any rate so far as the obligations as to pay and leave are concerned. There is particular inconsistency in two respects: (1) The provisions of the award provide for "no work, no pay," except as therein provided, whereas the operation of the State Act is to require the grant of the leave pay. (2) The provision of the award is that the employer may terminate the services of an employee upon a maximum of one week's notice and is thereupon required to pay the amount specified in the award. The operation of the State Act is to extend the employment notwithstanding its termination according to the award until the long service leave which the Act provides has expired; or, alternatively, to require the making of payments in addition to those specified by the award.

With regard to the tests of inconsistency, many of the authorities which involved general inconsistency also involved particular inconsistency as well; the two aspects of inconsistency are not mutually exclusive. Instances of how these tests of inconsistency have been applied in relation to industrial awards are, as regards general inconsistency, *Clyde Engineering Co. Ltd.* v. *Cowburn*[1] and *O'Sullivan* v. *Noarlunga Meat Ltd.*,[2] and as regards particular inconsistency, *Colvin* v. *Bradley Brothers Pty. Ltd.*[3] [Counsel then examined in detail the relevant provisions of the award and of the State Act, referred to the statement of principle in *The Queen* v. *Galvin; Ex parte Amalgamated Engineering Union, Australian Section*,[4] and continued:] The critical sections of the State Act are 7 and 9. The submissions compendiously are: (1) State law cannot interfere with settlements made by Commonwealth awards. (2) Here the State Act does so for—in descending order—(i) the Commonwealth settlement was on the footing of no obligation on the employers to give long service leave; (ii) the award is at least exhaustive as to pay and leave, and in both respects the State Act involves an additional obligation; (iii) the State law requires payment by an employer to a worker without return of services, whereas the award says no work, no pay, except as provided, and that is a clear case of inconsistency. A second additional obligation is that the State law either continues the employment for certain purposes when according to the award it has come to an end, or it requires payments to be made by the employer upon termination which the award by implication denies. Whether or not the employment is extended by the Act, it requires payments in addition to those prescribed by the award, and that is inconsistency.

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[1] (1926) 37 C.L.R. 466.

[2] [1957] A.C. 1; [1956] 3 All E.R. 177.

[3] (1943) 68 C.L.R. 151.

This case is really on all fours with *Colvin's* case.[5] Alteration of obligations is inconsistency. The award deals exhaustively with the subjects of pay, work and leave, and there is no room for any State law which deals with those subject-matters. The conciliation commissioner can make an award which will be inconsistent with the grant of long service leave, and he has done so here. Long service leave is nothing more than a period of paid suspension from duty. The description of annual leave in *The Queen* v. *Hamilton Knight; Ex parte The Commonwealth Steamship Owners Association*[6] corresponds exactly with long service leave. Annual leave and other periodical leave and long service leave have the same legal character and are directed to the same social evil. Sections 13 and 25 of the Conciliation and Arbitration Act are not decisive against the appellant, and it can succeed notwithstanding that there is this division in the Act.

The result of this case will make an enormous difference to industry—it is a very important application of the general principles of constitutional law to the particular circumstances of this case. Taken as a whole, there is a general inconsistency here of the kind to which section 109 applies. The High Court should have held that the State Act was inconsistent with the

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[4] (1952) 86 C.L.R. 34, 40.
[5] 68 C.L.R. 151.
[6] (1952) 86 C.L.R. 283, 303, 312, 325.

Commonwealth Act and the award and was invalid to the extent of that inconsistency, and that the appellant was not bound by the State Act to grant long service leave to Kemp.

Gregory Gowans Q.C. (Australia) and *J. G. Le Quesne* for the respondent. The proposition for the appellant—that the award is of such a character that no State law which purports to operate with respect to the industrial relationship existing between the parties to the award can validly so operate—is very far reaching. It would involve the exclusion of any State law which could be said to affect the industrial relationship, at all events so far as respects the rights and obligations of the persons who are parties to this award are concerned. If it were correct a number of topics which are the subject of State legislation would be affected by it—e.g., Workmen's Compensation legislation, the Factories and Workshops Act, 1928, and statutory superannuation provisions, and there could be no room for a State Act such as that in *Tasmanian Steamers Pty. Ltd.* v. *Lang.*[7] The conclusion for the appellant rests finally on the proposition that there is to be gathered from the award an inference that it was intended to state exhaustively the industrial relationship and the terms and conditions of the employment to the exclusion of any other statement affecting industrial relationship. Such a proposition is contrary to principle. While it confesses the constitutional limitations it fails to give effect to them, the first of which is that no law made under section 51 (xxxv) of the Constitution could authorize an award which went beyond the ambit of the dispute. No such award could operate to exclude a State law on a subject which was outside the ambit of the dispute. Authorities to show how this doctrine of the ambit of the dispute has been worked out and how it operates in relation to section 109 are *Australian Insurance Staffs' Federation* v. *Atlas Assurance Co. Ltd.*,[8] *Rex* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co.*[9] and *Rex* v. *Findlay; Ex parte Victorian Chamber of Manufactures.*[10] The last-cited case illustrates particularly the careful lines that are drawn between subject-matters so far as this doctrine of the ambit of dispute is concerned. The last case on this matter—decided since the judgment in the present case—is *Clarke* v. *Kerr*[11]; it is not contended that it is on all fours with this case, but it does point out the necessity of considering very carefully the fields in which the Commonwealth award and the State law respectively operate in any case in which there is said to be an alleged inconsistency. It is also important in its assessment of *Cowburn's* case.[12] Any Commonwealth law made under an arbitration head could not validly operate to exclude a State law on a subject-matter which was outside the dispute. The Arbitration Act can only operate in relation to industrial disputes as defined in the Act, and not to disputes within the constitutional conception. There is no evidence or any permissible inference that either the whole of the industrial relations between employer and employee or the matter of long service leave with pay was within the ambit of the dispute in which the award was made. [Reference was also made to *Ex parte McLean.*[13]]

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[7] (1938) 60 C.L.R. 111.

[8] (1931) 45 C.L.R. 409, 420.

[9] (1910) 11 C.L.R. 1, 30, 61.

[10] (1950) 81 C.L.R. 537, 543.

[11] (1955) 94 C.L.R. 489, 504.

With regard to the argument for the appellant that the award is an exhaustive statement on, at all events, the subject of leave and pay, the award cannot occupy a field which extends beyond the matter in dispute; the award could not be made as to long service leave in a dispute as to annual leave, because they are quite different in kind and character. Since the award could not validly contain a provision for long service leave, such an award could not be treated as occupying any field which embraced long service leave, either for the purpose of settling a dispute or of excluding the State laws from the topic.

The next contention for the appellant was that the award provides exclusively for pay and work. It is true that the award is exclusive on the subject of work done—that was the view of Isaacs J. in *Cowburn's* case.[14] It may also be that the award is an exclusive statement on pay for holidays and on the subject of paid annual leave, but one can go no further than that. When one comes to the subject of sick leave or absence from sickness the award then makes some provision for the payment embraced within sick leave, but it is not an exclusive statement on the subject of payment which can be made owing to absence for sickness without leave. It is submitted that the award does not provide exclusively for all kinds of payment. It does not constitute the whole content of the contract of service; it operates on the contract of service. All that the award is speaking about is pay which is due under the award, and the State Act is not dealing with pay due under the award.

The appellant also argued on the general inconsistency aspect that the Act is inconsistent with the award because its effect is to

[12] 37 C.L.R. 466.

[13] (1930) 43 C.L.R. 472, 485.

[14] 37 C.L.R. 466, 493.

destroy or vary the adjustment of industrial relations established by the award. The proposition stated in that way is wider than that stated by Isaacs J. in *Cowburn's* case.[15] The State law does not vary or disturb the adjustment with respect to matters in dispute if it deals with a matter which never was in dispute.

With regard to the subject of particular inconsistency, there must be found not a mere exclusion from the field occupied, but a direct clash—that the State law ordains something which the Federal law denies or denies something which the Federal law ordains: *O'Sullivan* v. *Noarlunga Meat Ltd.*[16] An element of inconsistency alleged is that the award relieves the employer of the obligation to pay wages after dismissal in specified circumstances. If the argument goes to the extent that there shall be no payment after termination of the employment, then, of course, it precludes the payment of the death duty which is provided under section 8 of the Act. As the award says nothing in the case of death payment to the personal representatives, the argument must be as true and as applicable in the case of death as to any other payment. So far as the construction of the award is concerned, it does not provide that there shall be no payment after the termination of the employment.

Another alleged inconsistency is that the State Act continues the employment of which the award authorizes the termination. That involves a misconstruction of the State Act, which does not purport to continue the employment for any purpose at all. It merely provides that where the man's employment is terminated, his leave is deemed to commence on the day the termination takes effect. He is entitled to be paid in respect of long service leave; accordingly, that is an end of the matter; there is no attempt on the part of the State to continue the employment. In short, the provisions of the State Act are such that they do not come into collision with or interfere with or disturb any of the provisions of the settlement made in the award, and in particular with the provisions in the award as to the duration or termination of the employment, the payment of wages for services rendered or annual leave with pay. [*Rex* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust.) Ltd.*[17] was referred to.]

R. M. Eggleston Q.C. in reply. It is pointed out in *Ex parte McLean*[18] that one will not readily find in the Commonwealth law with respect to one subject-matter an intention to exclude

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[15] 37 C.L.R. 466, 493.

[16] (1954) 92 C.L.R. 565, 593.

[17] (1949) 78 C.L.R. 389, 400, 408.

[18] 43 C.L.R. 472, 485.

State legislation with respect to a different subject-matter. That kind of escape, however, is not open to the respondent here, because this State Act is an employer and employee Act, and that is precisely the relationship which the Federal award purported to regulate. One cannot escape in this case on the basis that the laws are in different fields; there is here the same field, and the State law is superseded by the Federal law. There is first a question whether the Federal award intended to provide a code which would prevent the States from filling in any blanks, and if that intention is found no question of conflict can arise. It is a question of general inconsistency and is a question of construction of the award. The submission is that the award was intended to have the most comprehensive operation. Secondly, if an intention to forbid to the States the blank spaces is not to be found, but there is none the less direct and particular inconsistency between the Federal and State provisions, then, of course, the State legislation must yield. It is sufficient for the appellant if it is established that it was intended by the award to occupy the whole field of the relationship of employer and employee.

Long service leave is merely a particular thing within the general matter of pay and work. *Colvin's* case[19] is clearly correct. It was said that as the commissioner could not make a provision for long service leave he could not make a provision which was inconsistent with long service leave. Section 13 of the Conciliation and Arbitration Act does not restrict the commissioner's right to prescribe other clauses inconsistent with long service leave. The award is detracted from by a State law which operates in precisely the same field of legislation, and, indeed, in respect of the very matters with which the award is concerned. For a State Act to say that the employer shall grant 13 weeks' leave with pay is inconsistent with the whole idea of a weekly wage. It is tantamount to saying that if the employer wants to dismiss a man he first has to give him 13 weeks' leave. That strikes at the very root of the award that the employer is free to terminate the services of the employee on the payment of a penalty of a week's wages. That is a direct conflict between the State Act and the award. The proper construction of clause 19 (*c*) of the award is that an employee not attending for work does not get paid. The State Act can have no operation on an employer who employs a person under the award.

[19] 68 C.L.R. 151.

March 19. The judgment of their Lordships was delivered by LORD SOMERVELL OF HARROW, who stated the facts set out above and continued: The appellant submits in the first place that this award on its true construction regulates all the terms and conditions of employment; that it occupies the whole field; that long service leave is a term or condition of employment; and that therefore the Act so far as applicable to metal trade workers is inconsistent with the award although the award makes no reference to long service leave and does not purport to deal with it.

If this is right the appeal succeeds. Alternatively, the appellant submits that there is an actual conflict between the relevant provisions of the State Act and provisions of the award.

There was no issue between the parties as to the tests of inconsistency as laid down in *Ex parte McLean* [1] and other cases. It was common ground that no " inter se " issue within section 74 arose (*O'Sullivan* v. *Noarlunga Meat Ltd.*[2]).

There is an express reference to long service leave in sections 13 and 25 of the Conciliation and Arbitration Act which deal with the powers of a conciliation commissoner and the court respectively:—

" 13. (1) A Conciliation Commissioner shall not be empowered " to make an order or award—(*a*) altering the standard hours " of work in an industry; (*b*) altering the basic wage for adult " males (that is to say, that wage, or that part of a wage, which " is just and reasonable for an adult male, without regard to " any circumstance pertaining to the work upon which, or the " industry in which, he is employed) or the principles upon which " it is computed; (*c*) making provision for or in relation to, or " altering a provision for or in relation to, long service leave with " pay; (*d*) determining or altering the basic wage for adult females " (that is to say, that wage, or that part of a wage, which is " just and reasonable for an adult female, without regard to any " circumstance pertaining to the work upon which, or the industry " in which, she is employed) or the principles upon which it is " computed."

" 25. The court may, for the purpose of preventing or " settling an industrial dispute, make an order or award— " (*a*) altering the standard hours of work in an industry; " (*b*) altering the basic wage for adult males (that is to say, " that wage, or that part of a wage, which is just and reasonable

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[1] (1930) 43 C.L.R. 472.

[2] [1957] A.C. 1; [1956] 3 All E.R. 177.

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" for an adult male, without regard to any circumstance pertaining to the work upon which, or the industry in which, he is employed) or the principles upon which it is computed; " (*c*) making provision for or in relation to, or altering a provision " for or in relation to, long service leave with pay; (*d*) determining " or altering the basic wage for adult females (that is to say, that " wage, or that part of a wage, which is just and reasonable for " an adult female, without regard to any circumstance pertaining " to the work upon which, or the industry in which, she is " employed) or the principles upon which it is computed."

The Commonwealth power from which the award is derived comes from section 51 (xxxv). There is, of course, no Commonwealth power to legislate on industrial relations generally but only with respect to conciliation and arbitration for the prevention and settlement of industrial disputes. The powers of the court and a commissioner are necessarily limited. An award cannot give a form of relief that is not relevant to a matter in dispute (*Reg.* v. *Galvin; Ex parte Amalgamated Engineering Union, Australian Section*[3]).

Against this background the appellant's submission seems a remarkable one. An award will, of course, normally be construed as exhaustive in relation to matters with which it expressly deals. The appellant cited *Clyde Engineering Co. Ltd.* v. *Cowburn*[4] and *Colvin* v. *Bradley Brothers Pty. Ltd.*[5] In each case the award and the State Act dealt with the same subject-matter. In *Cowburn's* case[6] there were, as Rich J. said, " different " minimum wages and different maximum hours " provided by the Act and the award respectively. In *Colvin's* case[7] an order under a State Act prohibited the employment of females at milling machines altogether whereas the award allowed their employment unless this had been declared unsuitable by a Board of Reference.

The award in the present case is a composite document in that it embodies orders made either by the court or by commissioners in earlier disputes when the commissioners had wider powers than they now have under section 13 of the Act set out above. The award deals with basic wages, margin wages, apprenticeship, travelling and camping allowances, hours of work, overtime, holidays and Sunday work, contract of employment, annual and sick leave and other miscellaneous matters which need not be enumerated. There is no reference to long service leave. The logs setting out the dispute or disputes which led to the award were not before the court. It is plain that the question of long service leave had not been raised. If it had been raised the commissioner would have had to refer it to the court. If the appellant's submission were right it would mean that the commissioner had prevented the State from dealing with a " matter " which he could not himself deal with.

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[3] (1952) 86 C.L.R. 34, 40.
[4] (1926) 37 C.L.R. 466.
[5] (1943) 68 C.L.R. 151.
[6] 37 C.L.R. 466.
[7] 68 C.L.R. 151.

Their Lordships agree with the High Court that long service leave is an entirely distinct subject-matter from those matters which are determined and regulated by the award. In other words, long service leave differs in kind from public holidays and from annual leave. It is a separate item in industrial relations. This would seem obvious in principle, but is placed beyond argument in the present context by the provisions of sections 13 and 25 of the Conciliation and Arbitration Act which specify it as a separate item.

An obligation to grant long service leave imposes, no doubt, a burden on employers. It may or may not, according to the circumstances, justify a reconsideration of other conditions such as wages, hours or annual leave. Most terms and conditions of employment are inter-related in this way, but this does not mean that an award as to wages or annual leave is for that reason *inconsistent* with a provision for long service leave or canteens or some other separate matter.

This being so, their Lordships are of opinion that there are no grounds in principle or authority for construing this award as covering the " field " of long service leave.

The respondent sought to reinforce his case by an argument based on section 51 of the Conciliation and Arbitration Act which reads as follows: " 51. When a State law, or an order, award, " decision or determination of a State Industrial Authority, is " inconsistent with, or deals with any matter dealt with in, an " order or award, the latter shall prevail, and the former shall, " to the extent of the inconsistency, or in relation to the matter " dealt with, be invalid."

It was submitted that the words " or deals with any matter " made it more difficult for the appellant to argue that the award had disposed sub silentio of a matter with which it did not expressly deal. Their Lordships agree with the High Court that the argument is " difficult to support " and for the purposes of this case may be ignored.

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There remain for consideration the alleged particular inconsistencies. There is, it is said, actual conflict between certain specific provisions of the award and the relevant provisions of the State Act. It is, of course, possible for Acts dealing primarily with different subject-matters to have inconsistent provisions on particular matters. Apparent inconsistencies may, however, disappear, as here, when the words are construed in the limited context of the respective Acts. If, in dealing with annual leave, a man said, "I get only a fortnight's holiday a year," he would not mean that he worked seven days a week for fifty weeks.

The first point was based on the terms of the award dealing with dismissal on notice. By clause 19 (*b*) employment can be terminated by a week's notice or by the payment or forfeiture of a week's wages. This is, it is said, inconsistent with section 9 (2) of the State Act in that men who have served for 10 years or more, if dismissed, get more than one week's pay. The argument was developed and other provisions relied on, but it fails in limine once it is realized that the two documents are dealing with separate and distinct matters. The words of the award are appropriate to the general position of wage earners with which it is dealing. They do not purport to be applicable to long service leave, should provision be made for those who have so served. If the award had itself dealt in later clauses with long service leave one might well have expected the "general" clause to be made expressly subject to the provisions of the later special clause. The absence of such words creates no inconsistency when the matters are dealt with, as here, in separate and independent documents. On the basis of this conclusion on the first submission the whole award must be read as subject to the provisions of a State Act, if any, dealing with long service leave.

Reliance was also placed on clause 19 (*c*) (i) of the award, which reads as follows: "(*c*) (i) An employee (other than an employee "who has given or received notice in accordance with sub-clause "(*b*) of this clause) not attending for duty shall, except as pro-"vided by clause 20 of this award, lose his pay for the actual "time of such non-attendance." This, it is said, means "no "work no pay," whereas the State Act provides for 13 or more weeks of pay for no work. The answer as stated above can be reinforced in this case by the fact that the clause makes no reference for annual leave which, under clause 21 of the award, means two weeks of pay with no work. The word "duty" may well have been inserted to make it clear that the clause was not

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to operate when the employee was not due to attend either under his contract or under the award, or under any valid State Act.

For the above reasons, which are in substance the same as those given in the judgments of the High Court, their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant will pay the costs of this appeal.

Solicitors: *Park Nelson & Co.; Freshfields.*

C. C.

J. C.*

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ATTORNEY-GENERAL FOR AUSTRALIA . APPELLANT;

AND

THE QUEEN AND THE BOILERMAKERS' SOCIETY OF AUSTRALIA AND OTHERS . RESPONDENTS.

[AND CONNECTED APPEAL (CONSOLIDATED).]

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia — Constitutional law — Judicature — Union of arbitral and judicial functions in Court of Conciliation and Arbitration — Purported judicial powers ultra vires—Validity or invalidity not an inter se question—Appeal competent—Conciliation and Arbitration Act, 1904–1952 (*No.* 13 *of* 1904–*No.* 34 *of* 1952) (*Commonwealth*), *ss.* 29 (1) (*b*) (*c*), 29A — *Commonwealth of Australia Constitution Act,* 1900 (63 & 64 *Vict. c.* 12), *ss.* 51 (xxxix), 71–80.
Statute—Dominion—Validity.

It is not permissible under the Constitution of the Commonwealth of Australia for the Dominion Parliament to enact that upon one body of persons—tribunal or court—arbitral functions and judicial functions shall be together conferred. The Constitution is based on a separation of functions of government, and section 71 and the succeeding sections of Chapter III, dealing with "The Judicature," while affirmatively prescribing in what courts the judicial power of the Commonwealth may be vested and the limits of their jurisdiction, negatives the possibility of vesting such power in other courts or extending their jurisdiction beyond those limits. Chapter III is in its terms detailed and exhaustive, and to it alone Parliament must have recourse if it wishes to legislate in regard to the judicial power, subject to the qualification that under section 51 (xxxix) of the Constitution Parliament is empowered to make laws in respect of matters incidental to the execution of the power conferred by Chapter III. There is nothing in Chapter III which justifies the union of judicial and non-judicial power in the same body.

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* *Present*: VISCOUNT KILMUIR L.C., VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD TUCKER, LORD COHEN, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

Accordingly, the provisions of section 29 (1) (*b*) and (*c*) and section 29A of the Commonwealth Conciliation and Arbitration Act, 1904–1952, which purported to vest judicial power—even to the extent of fining a citizen or depriving him of his liberty—in the Court of Conciliation and Arbitration established under the Act with powers of an administrative, arbitral and executive character, were ultra vires and invalid.

Waterside Workers' Federation of Australia v. *J. W. Alexander Ltd.* (1918) 25 C.L.R. 434; *Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan* (1931) 46 C.L.R. 73; *In re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257; *Rex* v. *Federal Court of Bankruptcy, Ex parte Lowenstein* (1938) 59 C.L.R. 556; and *Queen Victoria Memorial Hospital* v. *Thornton* (1953) 87 C.L.R. 144 considered.

The function of an industrial arbitrator is completely outside the realms of judicial power and is of a different order: *Alexander's* case (supra, at p. 463).

Held, further, that the validity or invalidity of the sections of the Conciliation and Arbitration Act which purported to give the Arbitration Court judicial power was not a question as to the limits inter se of the constitutional powers of the Commonwealth and the States respectively within the meaning of section 74 of the Constitution, and a certificate of the High Court under that section was not therefore necessary to the competency of the Board to entertain this appeal.

Judgment and order of the High Court of Australia (1956) 94 C.L.R. 254 affirmed.

CONSOLIDATED APPEAL (No. 27 of 1956), by special leave, by the Attorney-General for Australia and by three judges of the Commonwealth Court of Conciliation and Arbitration, from a judgment and order of the High Court of Australia (March 2, 1956) which, by a majority of four judges to three, made absolute an order nisi for a writ of prohibition directed against the three judges of the Court of Conciliation and Arbitration and the Metal Trades Employers' Association.

The order for the writ of prohibition made by the High Court prohibited further proceedings under two orders of a judicial character made by the Arbitration Court on May 31 and June 28, 1955. The first order required obedience by the respondent Boilermakers' Society of Australia to a provision in an industrial award called "The Metal Trades Award," by ceasing to be a party to or concerned in a ban on work. The second order fined the society £500 for failure to comply with the first order.

The questions in this appeal—stated to be constitutional questions of great and general importance—were whether it was constitutional for the Commonwealth Parliament to grant both judicial and non-judicial powers to judges appointed for life, and, if not, whether in the case of such a grant to judges of the Commonwealth Court of Conciliation and Arbitration it was the grant of judicial or non-judicial powers which failed.

The High Court (Dixon C.J., McTiernan, Fullagar and Kitto JJ., Williams, Webb and Taylor JJ. dissenting) decided that it was unconstitutional to combine judicial and non-judicial power, and that in this case it was the grant of judicial power that was invalid.

The facts are fully stated, together with the relevant statutory provisions, in the judgment of the Judicial Committee.

1957. Jan. 14, 15, 16, 17, 21, 22, 23. *K. H. Bailey*, S.-G. for the Commonwealth, *D. I. Menzies Q.C.* and *C. I. Menhennitt* (all of Australia) for the appellants. The recent amendments to the Conciliation and Arbitration Act (hereinafter called the "Arbitration Act") have left both respondents, the Metal Trades Employers' Association and the Boilermakers' Society of Australia, with little practical interest in the outcome of this appeal, but the Boilermakers' Society has lodged a case. The amending legislation, however, has in no way diminished the significance of the case to the appellants, both the Attorney-General and the three judges, for the Arbitration Act as amended remains in existence with the mixture of judicial and non-judicial functions, and the Court of Conciliation and Arbitration (hereinafter called the "Arbitration Court") is still in existence, exercising a combination of judicial and non-judicial powers authorized by Parliament under the amending legislation. It will also be submitted, contrary to the contention for the respondents, that no question of the constitutional powers inter se of the Commonwealth and the States arises in the appeal and that accordingly a certificate of the High Court under section 74 of the Constitution was not necessary.

The basic submissions of the appellants are: (1) The Arbitration Court is a federal court because the Constitution gives power to Parliament to create federal courts and to define their jurisdiction, and this power has been exercised in the most explicit fashion in the Arbitration Act. (2) It is for Parliament to decide whether a body which it creates shall be a court, and there is no express or implied limitation on its power to do so. The only question is whether the power has been exercised. (3) Parliament may give to the court non-judicial functions, and its doing so does not prevent the court from being a federal court. The majority judgment of the High Court is, it is submitted, a rejection of a clear expression of parliamentary intention that the court should be a federal court and a superior court of record. The rejection of the High Court is based on the conclusion of the majority that because a federal court can only have judicial functions Parliament's choice of a body which has other functions is unconstitutional. The judgment concedes that there is no positive or express prohibition against a combination of powers, judicial and non-judicial, but the majority found such a limitation by implication by invoking the American doctrine of separation of powers.

The appellants contest the conclusion that a federal court cannot have other than judicial powers, and contest that if such a combination is not permissible, the creation of the court fails. Fundamentally, the appellants submit that unless one imports into the interpretation of the Australian Constitution the American doctrine of the separation of powers, there is no sufficient foundation or justification for making the implication that an Australian federal court can exercise nothing but judicial functions. The history and structure of the Australian Constitution should exclude the application of this American doctrine to the organs of the federal government and require instead the application of principles derived from the British constitutional tradition. The British doctrine is based on an independent judiciary. Having made those introductory observations, the first matter to be argued, by Mr. Menzies, is whether the appeal is competent.

D. I. Menzies Q.C. The question is whether or not the Board has jurisdiction to hear this appeal by virtue of section 74 of the Constitution Act. There has been no application to the High Court for a certificate, the appellants taking the stand that this is not a case to which section 74 applies. The Privy Council has laid down certain general principles to the effect that section 74 is a great constitutional provision and not to be frittered away by nice distinctions. Those general principles, however, are not of particular significance to the problem which faces the Board, because it is one of the application of the section rather than its interpretation, which is now fairly well settled. It is important that it should not be applied to cases which fall outside it. The section does not relate to powers which are not of a constitutional

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character. In *O'Sullivan* v. *Noarlunga Meat Ltd.*[1] an attempt was made to give the section a wider operation, but the Board insisted that it is only concerned with constitutional powers. It is also concerned with questions as to the limits of those powers. Then it is not merely the limits of constitutional powers, but the limits of those powers inter se as between the Commonwealth and the States. It is only if the decision under appeal is one which defines the limits of Commonwealth power on one side and of State power on the other that the section applies—there must be mutuality. The section never applies, for instance, when the decision does no more than show the limits of the power of the Commonwealth or of a State.

The first and simple submission is that the decision which is before the Board on this appeal is one which determines nothing as to the limits of State power. The second submission, which is only alternative, is that although the decision does determine something as to the Commonwealth constitutional power, it does not determine the limits of that power. The only question here is as to the mode of exercise of admitted power.

With regard to the first submission—that the decision is not one as to the limits of State power at all—it is not even a decision as to State power. The only questions here were the validity of sections 29 (1) (*b*) and (*c*) and 29A of the Arbitration Act. It is common ground that if those sections are valid, the constitutional source of the power must be found in Chapter III of the Constitution. The vital question is, has the power which Parliament derived from Chapter III, and in particular from sections 71 and 77 (1), been exercised in this case? The Arbitration Act has its source in two constitutional powers: (1) Parliament has power by section 51 (xxxv) to make laws with respect to conciliation and arbitration, but that power by itself would never suffice to enact the whole of the Arbitration Act; it would be quite impossible to enact section 17 (3)—that "the court shall "be a superior court of record." (2) The only power Parliament has in that respect is that which derives from section 71 of the Constitution. The only question before the High Court, and before this Board, is, has Parliament power to, and has it exercised its power under Chapter III, sections 71 and 77 (1), to create a federal court and give it part of the judicial power of the Commonwealth? and the submission is that that has nothing whatever to do with any State power. There appears to be no authority directly in point on this question; the submission rests on a point of principle.

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[1] Ante 1; [1956] 3 All E.R. 177.

Section 31 of the Arbitration Act, which purports to give an appeal from a State court to the Arbitration Court, is a curious section, and it has been declared invalid by the High Court: *Charles Marshall Pty. Ltd.* v. *Collins.*[2] In this case the validity of section 31 is not in question at all; its invalidation might well be thought to be an inter se question, but the distinction here is that there is nothing in section 29 (1) (*b*) and (*c*) or 29A which can be regarded in any way as limiting the jurisdiction of the State courts, and the success of this appeal does nothing to the jurisdiction of the State courts.

There was in Australia a great dispute as to the meaning of section 74, but in *Commonwealth of Australia* v. *Bank of New South Wales*[3] it was said that "decision" in section 74 means the judgment, decree, order or sentence of the court. So one is concerned here with the curial order of the High Court that sections 29 (1) (*b*) and (*c*) and 29A are invalid. If that is not an inter se question, then everything is open. *Shell Company of Australia* v. *Federal Commissioner of Taxation*[4] was not ruled out under section 74; it was the converse of the present case. There is nothing in the judgment in that case which discusses the question whether or not there was an inter se question, but the transcript of the application for special leave to appeal shows that there was a reference made to section 74, and the conclusion must be that it was not thought that the section prevented that appeal. Another case which is in somewhat the same situation is *W. R. Moran Pty. Ltd.* v. *Deputy Commissioner of Taxation for New South Wales.*[5] In *Ex parte Nelson* (*No.* 2)[6] Dixon J. made a valuable statement on the meaning and application of section 74 which has been accepted again and again, and by the Privy Council itself, as authoritative. *Nelungaloo Pty. Ltd.* v. *The Commonwealth*[7] again contains a general discussion; and in that case before the High Court an application for a certificate was refused.[8] It was said in the *Noarlunga Meat Ltd.'s* case[9] that no revision of the Privy Council cases was needed and that they were entirely in line with the earlier decisions of the High Court.

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[2] (1955) 92 C.L.R. 529.

[3] [1950] A.C. 235; 65 T.L.R. 633; [1949] 2 All E.R. 755.

[4] [1931] A.C. 275; 47 T.L.R. 115.

[5] [1940] A.C. 838; 56 T.L.R. 862; [1940] 3 All E.R. 269.

[6] (1929) 42 C.L.R. 258, 270.

[7] [1951] A.C. 34.

[8] (1952) 85 C.L.R. 545, 560.

[9] Ante 1, 25.

With regard to the second branch of the argument—which only arises if the first is not accepted—namely, that the decision against which it is sought to appeal, although one concerning Commonwealth power, is not a decision as to the limits of that power, the submission is that it is merely a decision as to the mode in which admitted Commonwealth power should be exercised. A decision as to the mode of exercising Commonwealth power is not a decision on an inter se question. Whether a Commonwealth power is subject to a restriction is not an inter se question; it is not an inter se question on the constitutional powers of the Commonwealth and the States. Section 92 of the Constitution does not give rise to an inter se question; nor does the restriction imposed by section 117. Section 29 (1) (*a*) of the Arbitration Act does no more than give a Commonwealth court power to punish contempt of its power and authority in relation to its judicial powers; under no circumstances and in no way could the State ever exercise that power. Section 29 (1) (*a*) has nothing whatever to do with State law. Also, if section 29 (1) (*b*) were struck out, one does not add to State power, and its existence does not detract from State power; that is the essence of the appellants' argument. The same comment is made on section 29 (1) (*c*); it is a complementary power to (*b*), and it tells one nothing about any power of the State.

The respondent society in their case advance a number of arguments in support of their contention that the subject-matter of this appeal does raise an inter se question. The appellants' general criticism of those arguments is that what the law is here concerned with is the exercise of power under Chapter III of the Constitution; the respondents' arguments refer to a number of matters which do not arise at all or at the present time, and lose sight of the words of section 74 itself—that the decision under challenge must be one as to the limits of the constitutional powers of the States and the Commonwealth. The respondents' case then refers to the following authorities: *Jones* v. *Commonwealth Court of Conciliation and Arbitration*[10]; *Minister for Trading Concerns for Western Australia* v. *Amalgamated Society of Engineers*[11]; *The Commonwealth* v. *Bank of New South Wales*[12]; *Nelungaloo Pty. Ltd.* v. *Commonwealth of Australia*[13]; *Pirrie* v. *McFarlane*[14]; *The Commonwealth* v. *Kreglinger & Fernau Ltd.*

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[10] [1917] A.C. 528; 33 T.L.R. 358.

[11] [1923] A.C. 170.

[12] [1950] A.C. 235; 65 T.L.R. 633; [1949] 3 All E.R. 755.

[13] [1951] A.C. 34.

[14] (1925) 36 C.L.R. 170.

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and Bardsley [15]; *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (*No.* 2),[16] and *O'Sullivan* v. *Noarlunga Meat Ltd.*[17]

Those cases were rightly decided, but it is submitted that they have no bearing on the present matter. The respondents' submission, however, is that those authorities warrant the following propositions: (A) Section 74 ought to be given a broad interpretation, in accordance with the policy of confining the decision of essentially federal questions to the High Court unless that court grants a certificate. (B) An inter se question arises when a question arises as to the validity of Commonwealth legislation which, if valid, would narrow the field in which State legislation or other constitutional power could operate. (C) Such a question arises whether or not the State has actually exercised the legislative or other power over which the Commonwealth power would be paramount. (D) Where the question is whether the exercise of Commonwealth power is invalidated by the failure to observe a condition or restriction to which the exercise of Commonwealth power is subject, an inter se question arises. (E) An inter se question arises when the question is whether the Commonwealth has power to set up an agency or authority (e.g., an airline corporation), since the State could not pass any legislation conflicting with the possession or exertion of the capacity bestowed on such agency or authority. (F) The constitutional powers referred to in section 74 are not limited to legislative powers but extend to judicial powers. (G) An inter se question arises where it is contended that the provisions of the Commonwealth statute, if valid, would be inconsistent with the maintenance of the constitutional integrity of the States.

With regard to those propositions, the appellants do not quarrel with (A) as a general statement, but if it means that section 74 should be given a meaning outside its actual words, they disagree. In essence they agree with (B); but they say that the decision of the present question does not restrict State power at all. (C) is a proposition which is supported by authority. The authorities cited do not support proposition (D), and there are actual decisions which show that one of the limitations on the exercise of Commonwealth power does not give rise to an inter se question: the *Moran Pty. Ltd.* case [18] and the *Nelungaloo* case.[19] (E) as it stands is misleading. An inter se question can only arise where the Commonwealth under a concurrent paramount power has set up an agency. As to (F), it is conceded that there can be a decision limiting Commonwealth legislative powers on one side and State executive powers on the other. There do not have to be powers of the same character on either side of the line. Therefore, if the present sections were found to limit State judicial power, then it would be an inter se question. The appellants are not prepared to accept (G) just as it stands. They are prepared to accept that the question whether or not a Commonwealth Act is valid on the ground that it interferes with the sovereignty of a State is apt to raise an inter se question, but the point must arise as an issue.

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[15] (1926) 37 C.L.R. 393.

[16] (1946) 71 C.L.R. 115.

[17] Ante 1.

[18] [1940] A.C. 838.

[19] [1951] A.C. 34.

The respondent society further submits in its case that the decision by the High Court that the Arbitration Court could not validly exercise judicial power was a decision upon an inter se question because: (i) Had the judicial power of the court been upheld, the States would not have been able to exercise their powers in such a way as to impair the performance by the court of the judicial functions so conferred. (ii) The judicial powers of the court, if valid, would have been exercisable in such a way as to affect the States in the exercise of their constitutional powers. (iii) Had the court been held to be a "federal court" within the meaning of Chapter III of the Constitution, the Commonwealth Parliament would have had power to make its jurisdiction exclusive of that which belongs to the courts of the States (Constitution, s. 77 (ii)). (iv) The principles adopted by the majority of the High Court impose a limitation or restriction on the exercise by the Commonwealth Parliament of its power to establish a system of conciliation and arbitration and also of its power to establish federal courts. (v) The constitutional requirement that the federal courts established by or under Chapter III of the Constitution shall be independent of the legislature and executive is an important and essential safeguard of the States, since to those courts is, or can be, committed the determination of matters arising under the Constitution or involving its interpretation, or arising under any laws made by the Parliament; and accordingly a contrary decision would impair the constitutional integrity of the States by subjecting such questions to the judicial determination of tribunals whose functions were not exclusively judicial but included also executive or administrative or legislative functions.

The appellants submit that (i) and (ii) (supra) do not arise; no order here challenged by the court directed a Minister of a State to do anything: one waits until these things arise. If the power referred to in (iii) were exercised, then that might give rise to an inter se question, but that is the question now before the Board. The submission is that (iv) does not give rise to any inter se question. With regard to (v), a decision is not one upon an inter se question even if it defines the limits of Commonwealth power unless it goes further and defines the limits of State power as well.

All the general statements both of the Privy Council and of the High Court support the contention that section 74 does not apply here. In principle it does not apply here because all that is determined is the mode in which the Commonwealth can validly exercise its admitted powers, and nothing whatever is decided as to State power or the limits of State power.

[VISCOUNT KILMUIR L.C., after consultation, said that their Lordships would reserve their decision on the inter se point until they had heard the argument on the whole case.]

K. H. Bailey. The High Court held that courts established under Chapter III of the Constitution have for their exclusive purpose the performance of judicial functions, and that it is not competent to Parliament to impose or confer upon them duties of another order. As to that, and in extension of the broad submissions made in opening, the appellants submit: (1) No such restriction or prohibition appears in the express words of the Constitution: in terms the relevant portions of Chapter III do no more than confer authority to create courts and to vest in them such part of the judicial power of the Commonwealth as Parliament thinks fit. (2) No such legal restriction or implication has ever formed part of the constitutions either of the colonies which federated to form the Commonwealth of Australia, or of the United Kingdom which was the primary source of Australian constitutional principles. (3) If any such legal restriction or prohibition is to be found in the Australian Constitution, it must be sought (and by the majority judges in the High Court was found) in an implication, which they drew from the fact that the Constitution in Chapters I, II and III vests respectively the legislative, executive and the judicial powers of the Commonwealth in distinct organs of government, that none of the organs was authorized to perform any other function than the one expressly assigned to it, with the exception only of functions purely ancillary to the one expressly assigned. (4) It is not contended that the presence of Chapters I, II and III of the Constitution and the form and content of sections 1, 61 and 71 are of no legal consequence and a mere draftsman's arrangement.

Thus from the fact that judicial power is to be invested in courts it is conceded that it is a proper implication that judicial power shall not be invested elsewhere than in courts. But, whilst this consequence does flow from the form of the Constitution, there is no warrant for introducing an entirely different implication, namely, that an organ which is empowered to exercise one of the functions specified in sections 1, 61 and 71 of the Constitution cannot also exercise some other function which is outside the categories therein specified, and in particular some part of the large and growing sphere of administrative functions.

(5) Such an implied prohibition cannot be supported except by the American doctrine of the legal separation of powers. (6) This doctrine should not be imported into the Australian Constitution, because, while certainly the division of powers between the Federation and the component States is based on American ideas, both the structure and mutual relations of the main organs of the federal government itself are wholly British in concept and should require the application of principles derived from the British tradition. (7) The difference between the British and the American constitutional doctrine in this field, broadly stated, is that the doctrine of the United States constitution rigidly excludes the holding of office in more than one branch of government, and consequently—on the assumption that the functions of the three traditional organs of government (legislative, executive and judicial) are mutually exclusive—denies to each the performance of any function other than the category expressly assigned to it by the Constitution and other functions merely incidental thereto. British doctrine, on the other hand, based on a parliamentary executive and on an independent judiciary, accepts the doctrine of the separation of powers only as a broad conventional guide to the plenary power and discretion of Parliament, and admits the utility, where special considerations exist, of institutions authorized to exercise a combination of functions that cut across the lines drawn by political theorists. (8) The text of the Australian Constitution, when seen in historical perspective, does not require or justify, and indeed is inconsistent with, the implication either that there cannot lawfully be any combination of judicial and non-judicial functions, or that the Parliament cannot make a body performing administrative functions a court, and give it judicial functions. On the contrary, the true principle of the Australian Constitution is that it is for Parliament to choose what organ is to be the repository of powers which are not strictly legislative, executive or judicial, so long as

it does not confer upon an organ functions inconsistent with the exercise of the function assigned to that organ by the Constitution.

The basic problem is, can the Australian Parliament attach non-judicial power to a federal court? There is nothing in the Constitution, express or properly implied, which prevents Parliament from conferring on a court, so long as it is properly authorized to exercise judicial functions, any other power which is not inconsistent with the exercise of the judicial power, and, secondly, not otherwise expressly assigned to another organ of government. The onus is on those who challenge the validity of a law to show that it is without authority: *Shell Company of Australia* v. *Federal Commissioner of Taxation.*[20] The broad submission on the material provisions of the Australian Constitution is that they provide no foundation for, and are indeed quite inconsistent with, the American doctrine of separation of powers in anything like the American form, and that the implications to which they point are those of the British constitutional system: *Hodge* v. *The Queen*[21]; *The Queen* v. *Burah*[22]; *Baxter* v. *Ah Way*[23]; *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.*[24]

The principal question is whether under section 71 of the Constitution Parliament could create a body which has non-judicial functions. The High Court considered this question substantially the same as the question whether Parliament could validly combine in any one body judicial and non-judicial powers. It is common ground that the combination of judicial and non-judicial functions is not expressly given by the Constitution, but the appellants submit, particularly in the British Constitution, that such a restricted implication should not be imported unless there are compelling reasons which make it necessary to do so. For the following reasons the appellants submit that section 71 of the Constitution should not be read as subject to an implied restriction or prohibition forbidding the Parliament to choose as the repository of judicial power a body exercising non-judicial functions: (1) The three categories of governmental power are not collectively exhaustive, and in particular do not provide for a vast mass of mixed functions which are best called administrative. Therefore it cannot as a matter of logic be implied, from the fact that the three functions are separately dealt with, that any of the three organs are limited exclusively to the function assigned. (2) No such implication can be drawn from British constitutional practice. (3) No such implication can be drawn from the fact that in a federal constitution special importance attaches to the functions of the judiciary. (4) The only relevant place where such an implication has been found is in article III of the United States Constitution, based there solely and explicitly upon the strict doctrine of the separation of powers, and the interpretation of that article is not transferable to the Australian Constitution. (5) The impossibility of defining the categories of governmental power so exactly as to avoid overlapping, particularly between administrative and judicial functions, affords a further reason for not implying a limitation of federal courts to strictly judicial functions (and functions merely incidental thereto). [Reference was made to Law and Orders, by Sir Carleton Kemp Allen, Chap. 1, p. 1; the Report of the Committee on Ministers' Powers, 1932, pp. 83–96; the Restrictive Trade Practices Act, 1956.]

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[20] [1931] A.C. 275.

[21] (1883) 9 App.Cas. 117.

[22] (1878) 3 App.Cas. 889.

[23] (1909) 8 C.L.R. 626, 634.

[24] (1920) 28 C.L.R. 129, 153.

The significant differences between article III of the United States Constitution and Chapter III of the Australian Constitution are so numerous and so great that it is altogether impracticable to take over as a whole the relevant interpretation of article III, and it would be unjustifiable to import into Australian law one particular implication which depended solely and expressly upon the separation of powers. For the position in the United States with regard to combination of judicial and non-judicial powers, see Corwin, Annotated Constitution of the United States of America, 1952 ed., pp. 533–536. The *Shell Company's* case,[25] affirmed in the Privy Council,[26] *Johnston Fear & Kingham and The Offset Printing Co. Pty. Ltd.* v. *The Commonwealth*,[27] *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* [28] and *Reg.* v. *Davison* [29] show that the High Court has on a number of occasions acted on the impracticability of any rigid separation between administrative and judicial powers.

The entire issue is, on one side, whether it follows from the vesting of judicial powers in federal courts by section 71 of the Constitution that the federal court can exercise only federal jurisdiction, that is to say, the judicial power of the Commonwealth and what is ancillary to the exercise of that power and no more, or, on the other side, whether the federal court may exercise the judicial power of the Commonwealth—federal jurisdiction—and any power ancillary thereto, and any other power that the legislature vests pursuant to the Constitution that is not inconsistent with the exercise of the federal power. The basic proposition on this aspect of the case has been and must be that it is the Parliament's creation of a court which is the central feature of the legislation. Parliament by the Arbitration Act created a court as provided by section 71, and in pursuance of sections 76 and 77 it vested it with a limited part of the judicial power of the Commonwealth, and the contention of the appellants is that there is a federal court—section 17 (3) of the Arbitration Act necessarily produces that result—and that the court so created has the powers vested by sections 29 (1) (*a*), (*b*) and (*c*) and 29A, namely, the power to hear and determine matters arising under the law of the Commonwealth. There is no express provision precluding Parliament from vesting non-judicial functions in a tribunal exercising part of the judicial power of the Commonwealth. The order nisi should be discharged.

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[25] (1926) 38 C.L.R. 153, 178–179.

[26] [1931] A.C. 275.

[27] (1943) 67 C.L.R. 314, 326.

[28] (1944) 69 C.L.R. 185, 210–211.

[29] (1954) 90 C.L.R. 353, 380.

D. I. Menzies Q.C. following. A review of the relevant authorities—almost exclusively Australian, because this matter has not been raised directly before this Board—shows that (1) there is no earlier decision of the High Court supporting the decision under appeal. (2) There are decided cases of the High Court directly opposed to the decision under appeal. (3) The only dictum directly in support of the present decision is that of Dixon J. in *Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan*,[30] which is not supported by the authorities he referred to. (4) There is a body of dicta of a number of judges directly opposed to the decision under appeal.

The judicial power must be vested in a federal court: *State of New South Wales* v. *The Commonwealth*,[31] in which it was merely said that as the members of the Inter-State Commission were only appointed for seven years it could not be a federal court; *Reg.* v. *Davison*[32]; *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation*[33]; *In re Judiciary and Navigation Acts*,[34] in which the question was whether Parliament could confer judicial powers which were not part of the judicial power of the Commonwealth, and the answer was that it could not. The Commonwealth does not wish to argue that it can vest any judicial power in a body which is not a federal court. It is not the appellants' contention that Parliament has power to vest executive power anywhere; that is done by the Constitution itself, section 61; it is vested in the Queen and exercised by the Governor-General, and from that Parliament cannot detract. The High Court has held in a series of cases that Parliament can give to the executive something which is not executive power, namely, power to make subordinate legislation. Parliament cannot confer judicial power except on courts. It can combine judicial and non-judicial powers unless the Constitution says that it cannot; it does not say so, and there is nothing in it from which there can be implied a prohibition to that effect. It is conceded that irreconcilable functions are not to be assigned to one body.

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[30] (1931) 46 C.L.R. 73.

[31] (1915) 20 C.L.R. 54.

[32] 90 C.L.R. 353.

[33] (1925) 35 C.L.R. 422.

[34] (1921) 29 C.L.R. 256.

Parliament can exercise Chapter III powers and other powers, including those under section 51, concurrently. The powers under section 51 are not part of the judicial power of the Commonwealth; they are powers of a different order. Section 86 of the Judiciary Act is a clear instance of the exercise of incidental power by Parliament. And section 51 (17) is another power that can be used concurrently with Chapter III powers.

The next group of cases are instances of where the High Court itself has by virtue of Commonwealth legislation exercised jurisdiction which is not derived from Chapter III. If Chapter III is exhaustive and exclusive, if somewhere in it is to be found an implication of those powers and no others, then there is no room for the High Court to have jurisdiction conferred on it by any legislation passed pursuant to a power not to be found in Chapter III. It is not said that this takes the appellants all the way, but it militates strongly against the implication of a prohibition in Chapter III: *Rex* v. *Bernasconi*[35]; *Porter* v. *The King*[36]—it is a strong decision in the appellants' favour; *The King* v. *Federal Court of Bankruptcy; Ex parte Lowenstein*,[37] which, it is submitted, was a case where the High Court upheld a mixture of judicial and non-judicial power in a federal court, namely, the Federal Court of Bankruptcy, and that is squarely on the point of the present case. It was said in that case that the power which was not of a judicial order was not inconsistent with the exercise of the judicial office. The judgment of the minority in *Lowenstein's* case[37] has really become the judgment of the majority in the present case.

Another group of cases, of which only two need be referred to —*Roche* v. *Kronheimer*[38] and *Dignan's* case[39]—are concerned with the problem, not in issue here, whether or not legislative power can be conferred on the executive government of the Commonwealth. It was argued that it could not by virtue of the arrangement of the Constitution following the American model, and that the doctrine of separation of powers incapacitated the executive from receiving legislative power and incapacitated the legislature from granting any part of its power to the executive. The decision was that Parliament could make a law giving the executive power to make regulations which had the force of law and, indeed, which overruled any existing Act of Parliament. It was legislative power in the purest sense.

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[35] (1915) 19 C.L.R. 629.

[36] (1926) 37 C.L.R. 432, 438.

[37] (1938) 59 C.L.R. 556.

[38] (1921) 29 C.L.R. 329.

[39] 46 C.L.R. 73.

While being conscious of the difference between judicial, legislative and executive power, a good deal of assistance from this line of cases can be obtained in two ways: (i) These cases are a rejection of the doctrine of strict separation of powers. They say that this doctrine does not apply, and it is submitted that it does not apply in any respect; (2)—and of great significance in this case—the decision in those cases does reject the notion that one reads into section 61 of the Constitution any words of limitation which would confine the executive government of the Commonwealth to the exercise of executive powers. So, also, it is submitted, there is no ground for a like implication in section 71. Those cases are the strongest authority, unchallenged since 1931, that there cannot be implied in section 61 of the Constitution the words "the executive shall exercise no other power"; that is refuted, and if that cannot be done in section 61, how can it be done in section 71?—indeed, the implication is a great deal more difficult.

Passing to cases which have been decided on the Arbitration Act, reliance is placed on *Waterside Workers' Federation of Australia* v. *Alexander (J. W.) Ltd.*[40]; it does not decide in terms this very question, but to the judges the only objection that was open to this Arbitration Court as then constituted was that the President did not have life tenure, and some of them thought that if there had been life tenure, then the combination of functions was permissible. In *Jacka* v. *Lewis*[41] the court, knowing of the defect in *Alexander's* case,[42] said in effect that all had been then cured. That cannot be pushed too far—but see *per* Rich J.[43] *Harrison* v. *Goodland*,[44] *Rex* v. *Commonwealth Court of Conciliation and Arbitration; Barrett* v. *Opitz*[45] and *Australian*

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[40] (1918) 25 C.L.R. 434.
[41] (1944) 68 C.L.R. 455.
[42] 25 C.L.R. 434.
[43] 68 C.L.R. 455, 460.
[44] (1944) 69 C.L.R. 509.
[45] (1945) 70 C.L.R. 141.

Workers' Union v. *Bowen*[46] are cases of a similar character. It was held in *Rex* v. *Taylor; Ex parte Roach*[47] that the Arbitration Court, being constituted by statute a superior court of record, had by the common law power to punish summarily for contempt of its judicial authority. [Reference was also made to *Rex* v. *Taylor; Ex parte Federated Iron Workers' Association*,[48] *Rex* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Federated Gas Employees' Industrial Union*,[49] *Reg.* v. *Kelly; Ex parte Waterside Workers' Federation of Australia*,[50] *Reg.* v. *Kelly; Ex parte Berman*[51] and *Reg.* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Amalgamated Engineering Union.*[52]]

The appellants' submission in the present case is in accordance with constitutional history and decided cases, and it is necessary to depart from everything for the purpose of upholding this majority judgment. It requires very strong justification to import some foreign doctrine based upon mutual mistrust of the organs of government for the purpose of limiting powers in the distribution of powers in the Commonwealth of Australia. The majority of the court below relied on *Queen Victoria Memorial Hospital* v. *Thornton*[53] and *Steele* v. *Defence Forces Retirement Benefits Board*,[54] and they are relied on in the case for the respondents. It is said that they are inconsistent with the success of this appeal. The appellants submit that neither of those cases would be affected by the success of this appeal; the former was a bare grant of non-judicial power and therefore outside Chapter III; the latter was a question as to the extent to which original jurisdiction can be conferred on the High Court itself.

It is said in the majority judgment of the High Court[55] that "such matters as judicial dicta, common assumptions tacitly "made and acted upon, and the fact that legislation has passed "unchallenged for a considerable period of time, may be regarded "as raising a presumption which should prevail until the judicial "mind reaches a clear conviction that consistently with the "Constitution the validity of the provisions impugned cannot be "sustained. But they cannot be regarded as doing more." The appellants would ask the Board to adopt that very principle in dealing with this appeal; in addition, on the proper construction of the cases there are not merely dicta but decisions the other way, *Lowenstein's* case[56] in particular—the line of decision is uninterrupted, and this legislation has stood for 30 years until the last year or so. Should the appeal be allowed, the appellants do not ask for costs.

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[46] (1948) 77 C.L.R. 601.
[47] (1951) 82 C.L.R. 587.
[48] (1949) 79 C.L.R. 333.
[49] (1951) 82 C.L.R. 267.
[50] (1952) 85 C.L.R. 601.
[51] (1953) 89 C.L.R. 608.
[52] (1953) 89 C.L.R. 636.
[53] (1953) 87 C.L.R. 144.
[54] (1955) 92 C.L.R. 177.
[55] 94 C.L.R. 254, 296.

The respondents were not represented, but the respondent, the Boilermakers' Society of Australia, lodged a case.

March 19. The judgment of their Lordships was delivered by VISCOUNT SIMONDS. These consolidated appeals from an order of the High Court of Australia raise questions of great constitutional importance upon which the judges of that court were not able to agree. This has had for their Lordships the advantage that both sides of the case have been presented with the cogency and clarity which distinguish the judgments of the court, an advantage the more valuable because they have not had the assistance of argument by counsel for the respondents.

The constitutional issues that arise can best be understood if the relevant facts are first briefly stated. The respondents, the Boilermakers' Society of Australia, which will be called the Union, is an organization of employees registered in accordance with the provisions of the Conciliation and Arbitration Act, 1904–1952, a Federal Act which will be referred to as the Act. The Metal Trades Employers' Association is an organization of employers similarly registered. On January 16, 1952, an award was made under the Act binding both the Union and the Association, of which clause 19 (*ba*) (i) was as follows: "No organization "party to this award shall in any way, whether directly or "indirectly, be a party to or concerned in any ban, limitation or "restriction upon the performance of work in accordance with "this award."

The Association, alleging that the Union had not complied with this clause of the award, applied to the Commonwealth Court of Conciliation and Arbitration, a court established under the Act which will be referred to as "the court," for a rule that the Union should show cause why an order should not be made under section 29 (1) (*b*) of the Act ordering compliance with the said clause of the award, and an order under section 29 (1) (*c*) of the Act enjoining them from committing or continuing a breach of the same clause. On May 16, 1955, the court made an order accordingly. The rule came on for hearing on May 31 before the court constituted by Kirby, Dunphy and Ashburner JJ.

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[56] 59 C.L.R. 556.

and (subject to certain immaterial amendments) was made absolute, the Union being ordered to comply with the award as therein stated and being enjoined from further breach of it.

The Union having, as the Association alleged, disobeyed the order of the court of May 16, 1955, the latter issued a summons directed to the former to answer a charge of contempt of the court in respect of such disobedience, and upon the hearing of this summons the court, on June 28, 1955, made orders fining the Union £500 for contempt and ordering them to pay the costs of the Association.

At this stage the controversy begins which has now reached their Lordships, for on July 30, 1955, the Union applied to the High Court of Australia and obtained from McTiernan J. an order nisi directed to the judges of the court which had made the orders of May 31 and June 28, 1955, and to the Association to show cause why a writ of prohibition should not issue prohibiting them from further proceeding with or upon the said orders. The ground of the application and order may conveniently be set out in full. It was:

"That the provisions of sections 29 (1) (*b*) and 29 (1) (*c*) and "29A of the Conciliation and Arbitration Act, 1904–1952, are "ultra vires and invalid in that:—(A) the Commonwealth Court "of Conciliation and Arbitration is invested by statute with "numerous powers, functions and authorities of an administra-"tive, arbitral, executive and legislative character, and (B) the "powers which sections 29 (1) (*b*), 29 (1) (*c*) and 29A respec-"tively of the Conciliation and Arbitration Act, 1904–1952, "purport to vest in the said court and exercised by it in making "the said orders are judicial, and (C) the said sections 29 (1) (*b*), "29 (1) (*c*) and 29A are accordingly contrary and repugnant to "the provisions of the Constitution of the Commonwealth and, "in particular, Chapter III thereof."

The matter duly came before the High Court and was heard by seven judges in August, 1955. On March 2, 1956, the order nisi was made absolute, a majority judgment being given by Dixon C.J. and McTiernan, Fullagar and Kitto JJ., and separate dissentient judgments by Williams, Webb and Taylor JJ.

After this brief statement of the facts it will be convenient to turn to the Act, and it must be considered in the first place in the form which it bore at the date when the relevant orders were made. It will be necessary at a later stage to refer to some of the changes which were made before it assumed that form.

The title of the Act is not without importance. It is (and always has been) intituled " An Act relating to Conciliation and " Arbitration for the Prevention and Settlement of Industrial " Disputes extending beyond the limits of any one State." The chief objects of the Act are stated to be " (*a*) to establish an " expeditious system for preventing and settling industrial disputes by the methods of conciliation and arbitration: (*b*) to " promote goodwill in industry and to encourage the continued " and amicable operation of orders and awards made in settlement of industrial disputes: (*c*) to provide for the appointment " of conciliation commissioners having power to prevent and " settle industrial disputes by conciliation and arbitration: " (*d*) to provide means whereby a conciliation commissioner may " promptly and effectively, whether of his own motion or otherwise, prevent and settle threatened, impending, probable or " existing industrial disputes: (*e*) to provide for the observance " and enforcement of such orders and awards: (*f*) to constitute " a Commonwealth Court of Conciliation and Arbitration having " exclusive appellate jurisdiction in matters of law arising under " this Act and limited jurisdiction in relation to industrial disputes: and (*g*) to encourage the organization of representative " bodies of employers and of employees and their registration " under this Act."

Such being the title of the Act and such its chief objects, it cannot be denied that its primary purpose and, in effect, its only purpose is the settlement of industrial disputes by conciliation and arbitration. It is necessary, however, to see what part is to be played by the court established under the Act in a field apparently so remote from the proper exercise of the judicial function.

After certain introductory matters in Part I the Act proceeds in Part II to provide for the appointment of conciliation commissioners and to prescribe their duties and functions. The importance for the present purpose of this Part of the Act lies in the fact that it is made competent for, and in certain events compulsory on, the conciliation commissioner to refer disputes in which he has original cognisance to the Chief Judge of the court who may in turn refer them to the court for hearing and settlement. The jurisdiction of the court (if in this connexion jurisdiction is a proper term to use) extends to industrial disputes beyond those specially referred to it by later provisions of the Act.

Part III of the Act establishes the court. It enacts that there shall be a Commonwealth Court of Conciliation and Arbitration, that it shall consist of a Chief Judge and such other judges as are appointed in pursuance of the Act, and that it shall be a Superior Court of Record. It provides that the Chief Judge and each other judge shall be appointed by the Governor General and shall not be removed except by the Governor General on an address from both Houses of the Parliament in the same session praying for his removal on the ground of proved misbehaviour and incapacity, and it makes provision for remuneration. It thus complies with the provisions of section 72 of the Constitution in regard to the justices of the High Court and of the other courts created by the Parliament. It then prescribes what jurisdiction may be exercised by a single judge, other jurisdiction being exercised by not less than three judges. By section 25 an important original jurisdiction is conferred on the court. It enacts that the court may for the purpose of preventing or settling an industrial dispute make an order or award (*a*) altering the standard hours of work in an industry, (*b*) altering the basic wage for adult males (that is to say, that wage or that part of a wage which is just and reasonable for an adult male without regard to any circumstance pertaining to the work upon which, or the industry in which, he is employed) or the principles upon which it is computed, (*c*) making provision for or in relation to, or altering a provision for or in relation to long service leave with pay, (*d*) determining or altering the basic wage for females as therein mentioned.

Enough has been said to place it beyond dispute that there have been vested in the court powers, functions, and authorities of an administrative, arbitral, and executive character as alleged in the application for a writ of prohibition.

Next it must be asked whether judicial power also has been vested in it. It is clear that that is a purpose of the Act. For otherwise it would not be called a court or a superior court of record or make such provision for the appointment of judges as has already been mentioned. But if this is not enough, it is necessary only to look at sections 29 and 29A of the Act. Under section 29 the court is empowered (*a*) to impose penalties as therein mentioned for a breach or non-observance of an order or award proved to the satisfaction of the court to have been committed, (*b*) to order compliance with an order or award proved to the satisfaction of the court to have been broken or not observed, (*c*) by order to enjoin an organization or

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person from committing or continuing a contravention of the Act or a breach or non-observance of an order or award, (*d*) to give an interpretation of an order or award, together with divers other powers. And by 29A it is provided (1) that the court has the same power to punish contempts of its power and authority whether in its relation to its judicial powers or otherwise as is possessed by the High Court in respect of contempts of the High Court; (2) that the jurisdiction of the court to punish a contempt of the court committed in the face or hearing of the court when constituted by a single judge may be exercised by that judge, and that in any other case the jurisdiction of the court to punish a contempt of the court shall (without prejudice as therein mentioned) be exercised by not less than three judges; (3) that the court has power to punish as a contempt of the court an act or omission although a penalty is provided in respect of that act or omission under some other provision of the Act; (4) that the maximum penalty which the court is empowered to impose in respect of a contempt of the court consisting of a failure to comply with an order of the court made under section 29 (1) (*b*) or (*c*) is (*a*) where the contempt is by (i) an organization not consisting of a single employer, £500, or (ii) an employer or the holder of an office in an organization as therein mentioned £200 or imprisonment for 12 months, or (*b*) in any other case £50.

No other section of the Act need be mentioned. It has become clear that just as administrative, arbitral and executive powers, functions and authorities are vested in the court so also is judicial power vested in it, even to the extent of fining a citizen or depriving him of his liberty.

At this stage their Lordships would refer to a significant passage in the majority judgment of the High Court. It is as follows [1]: " There is, of course, a wide difference—and probably " it is more than one of degree—between a denial on the one " hand of the possibility of attaching judicial powers accompanied " by the necessary curial and judicial character to a body whose " principal purpose is non-judicial in order that it may better " accomplish or effect that non-judicial purpose and, on the other " hand, a denial of the possibility of adding to the judicial powers " of a court set up as part of the national judicature some non- " judicial powers that are not ancillary but are directed to a " non-judicial purpose. But, if the latter cannot be done, clearly " the former must be then completely out of the question." Their Lordships by no means dissent from this statement, but they make use of it in order to emphasize that the substance of the matter must be regarded and that in the matter under consideration the primary and essential object of the Act was the settlement of industrial disputes, that this object can be fulfilled only by the intermediacy of a body of persons established for that purpose, that the functions of a body so established are not judicial, that to call it a court or a superior court of record does not convert its non-judicial functions into judicial functions, and that to add judicial functions or powers to them means only that a body created to exercise non-judicial functions has now vested in it judicial functions also. Before turning to a consideration of the vital question in this case it is desirable to repeat that (as was said in the majority judgment) the function of an industrial arbitrator is completely outside the realm of judicial power and is of a different order. As was said by Isaacs and Rich JJ. in *Waterside Workers' Federation of Australia* v. *Alexander (J. W.) Ltd.*[2] " . . . the essential difference is that the judicial power is " concerned with the ascertainment, declaration and enforcement " of the rights and liabilities of the parties as they exist, or are " deemed to exist, at the moment the proceedings are instituted; " whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what " in the opinion of the arbitrator ought to be the respective rights " and liabilities of the parties in relation to each other." And as was said by Taylor J. in his dissentient judgment in the present case[3]: " It is, of course, much too late in the day to contend that " ' arbitral ' functions of the nature created by the Conciliation " and Arbitration Act can ever constitute any part of the judicial " power of the Commonwealth." With this statement the learned Solicitor-General for the Commonwealth expressed his agreement. It is necessary throughout to bear in mind that the words " arbitration " and " arbitral functions " refer exclusively to the arbitration and arbitral functions for which the Act provides. The same words in another context may mean something closely resembling a judicial process.

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[1] (1956) 94 C.L.R. 254, 271.

It must be stated here that in their formal case the respondents objected to the competence of this appeal on the ground that it raised what has become familiarly known as an inter se question and therefore fell within section 74 of the Constitution. The argument in favour of the objection was fully stated in the case and their Lordships gave the question long consideration. They have, however, been satisfied that the objection is not a valid one and will state their reasons after they have dealt with the case on its merits.

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[2] (1918) 25 C.L.R. 434, 463.

[3] 94 C.L.R. 341.

The problem can now be stated. Is it permissible under the Constitution of the Commonwealth of Australia for the Parliament to enact that upon one body of persons, call it tribunal or court, arbitral functions and judicial functions shall be together conferred? The problem can be solved only by an examination of the Constitution itself. The expression "arbitral functions" is here used to describe compendiously the functions exercisable by the court other than its judicial functions.

The Constitution was enacted and established by an Act of the Imperial Parliament (63 & 64 Vict. c. 12). The Act recited that the people of New South Wales, Victoria, South Australia, Queensland and Tasmania had agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom and under the Constitution thereby established, and by section 9 enacted that the Constitution of the Commonwealth should be as therein followed. Some weight has been attached to the fact that the Act was an Imperial Statute, but it is difficult to see how this can affect its interpretation. It can safely be assumed (and it is the historical fact) that in convention after convention in Australia the terms of the Constitution were hammered out by members of the several States who were profoundly conversant with the political systems of the United Kingdom and the United States and were in particular well aware both of the advantages of the separation of powers in a federal system and of the danger of a too rigid adherence to that theory. It is with this background that the Constitution must be interpreted, and their Lordships find it equally easy to accept as general propositions the statement of the appellants that, whereas under the United States Constitution there is a complete separation of powers, in the Australian Constitution, which in some aspects follows the British model, the doctrine is not strictly followed, and on the other hand the statement of the respondents, founded upon the highest authority, that "the Constitution is based upon a separation of the functions of Government and the powers which it confers are divided into three classes—legislative, executive and judicial." Both these statements are true, but both are subject to the qualifications which are to be found in the Constitution itself.

That the Constitution is based upon a separation of the functions of government is clearly to be seen in its structure, which closely follows the model of the American Constitution.

By section 1, which is contained in Chapter I, "The Parliament," it is provided that the legislative power of the Commonwealth shall be vested in a Federal Parliament, and the following 59 sections deal broadly with its composition and powers. It is only necessary at this stage to refer to section 51, which provides that the Parliament shall, subject to the Constitution have power to make laws for the peace, order and good government of the Commonwealth with respect to (amongst other matters) "(xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any "one State." By section 61, which is the first section of Chapter II, "The Executive Government," it is provided that the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor General as the Queen's representative, and extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. The following nine sections of Chapter II deal with the exercise of executive power. By section 71, which is the first section of Chapter III, "The Judicature," it is provided that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court to be called the High Court of Australia and in such other Federal Courts as the Parliament creates and in such other courts as it invests with federal jurisdiction. The following nine sections of Chapter III deal with the appointment of judges, their tenure of office and remuneration, the appellate jurisdiction of the High Court, appeals to the Queen in Council, the original and additional jurisdiction of the High Court, the power of the Parliament to define jurisdiction and certain other matters.

Such is the bare structure of the Constitution and it will be necessary to look more closely into some of its provisions. But enough has been said to suggest that in the absence of any contrary provision the principle of the separation of powers is embodied in the Constitution. Section 1, which vests legislative power in a Federal Parliament, at the same time negatives such power being vested in any other body. In the same way section 71 and the succeeding sections, while affirmatively prescribing in what courts the judicial power of the Commonwealth may be vested and the limits of their jurisdiction, negatives the possibility of vesting such power in other courts or extending their jurisdiction beyond those limits. It is to Chapter III alone that the Parliament must have recourse if it wishes to legislate in regard to the judicial power. That chapter is in its terms detailed and exhaustive, and their Lordships dissent from the contention sometimes explicitly, sometimes implicitly, advanced that, inasmuch as there is no express prohibition of other legislation in this field, it is open to the Parliament to turn from Chapter III to some other source of power.

Yet this general proposition is subject to a qualification, and it is a qualification which powerfully supports the proposition. For in section 51, the final matters in respect of which the Parliament is empowered to make laws are found in placitum (xxxix): "Matters incidental to the execution of any power "vested by this Constitution in the Parliament or in either House "thereof or in the Government of the Commonwealth or in the "Federal Judicature or in any Department or officer of the "Commonwealth." This placitum looks forward to the vesting of power in the Federal Judicature which is found in Chapter III: it assumes such vesting and empowers the Parliament to make laws in respect of matters incidental to the execution of such power. The conferment of such a limited power of legislation in section 51 makes it very clear that it is in Chapter III alone that a larger power is contained. There could not well be a clearer case for the application of the maxim "Expressio unius exclusio "alterius."

The argument so far appears to lead irresistibly to the conclusion that it is only in Chapter III that legislative authority is to be found to vest the judicial power of the Commonwealth. If so, it is to the provisions of that Chapter that one must look to find authority for the vesting in a court powers and functions which are not judicial or to vest in a body of persons exercising non-judicial functions part of the judicial power of the Commonwealth. The problem is advisedly stated in this alternative form, because it appears to their Lordships (to use words familiar in connexion with another much debated section) that it would make a mockery of the Constitution to establish a body of persons for the exercise of non-judicial functions, to call that body a court and upon the footing that it is a court vest in it judicial power. In *Alexander's* case,[4] which has already been referred to, Griffith C.J. once and for all established this proposition in words that have not perhaps always been sufficiently regarded: "It is "impossible," he said, "under the Constitution to confer such "functions [i.e., judicial functions] upon any body other than a "court, nor can the difficulty be avoided by designating a body, "which is not in its essential character a court, by that name, or "by calling the functions by another name. In short, any

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[4] 25 C.L.R. 434, 442.

" attempt to vest any part of the judicial power of the Common-" wealth in any body other than a court is entirely ineffective." And in the same case these words came from Barton J.[5]: " Whether persons were judges, whether tribunals were courts, " and whether they exercised what is now called judicial power, " depended and depends on substance and not on mere name." The question, in whatever form it is stated, is whether and how far judicial and non-judicial power can be united in the same body. Their Lordships do not doubt that the decision of the High Court is right and that there is nothing in Chapter III, to which alone recourse can be had, which justifies such a union. It may be repeated that this is subject to such qualification as is imposed by section 51 (xxxix).

Little reference has so far been made to the great volume of authority on this subject. Their Lordships have thought it right to make an independent approach to what is, after all, a short, if not a simple, question of construction of the Constitution. They must add that the exhaustive examination of the problem and the review of the relevant authorities which are to be found in the majority judgment of the High Court have been of the greatest assistance to them and appear to lead inevitably to the conclusion which they and the High Court have reached.

It is proper, however, if only out of respect to the dissentient judgments in the High Court and to the argument of counsel for the appellants, to refer to certain aspects of the case.

In the first place it has been a matter of somewhat theoretical controversy how far the Constitution embodies the doctrine of separation of powers. It is a doctrine, said Williams J., which should be applied " with great circumspection." Their Lordships do not dissent, but must bear in mind how often it has been stated in the High Court that the Constitution is based upon a separation of the functions of government. One among many examples may be found in *State of New South Wales* v. *The Commonwealth* (the *Wheat* case).[6] But, first and last, the question is one of construction and they doubt whether, had Locke and Montesquieu never lived nor the Constitution of the United States ever been framed, a different interpretation of the Constitution of the Commonwealth could validly have been reached. Their Lordships would adopt the words of Dixon J. (as he then was) in *Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan*[7]: " But an independent consideration of

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[5] 25 C.L.R. 434, 451.

[6] (1915) 20 C.L.R. 54, 88.

[7] (1931) 46 C.L.R. 73, 96.

"the provisions of the Commonwealth Constitution unaided by any "such knowledge" (i.e., knowledge of the Constitution of the United States) "cannot but suggest that it was intended to con-"fine to each of the three departments of government the exercise "of the power with which it is invested by the Constitution." It was consistent with this view that in the very early days of the Commonwealth the High Court construed the Constitution as containing negative implications, saying in *Dalgarno* v. *Hannah*[8] that Parliament "has no authority to create any additional "appellate jurisdiction."

Then it has been urged that the doctrine has not always been closely observed in regard to the separation of legislative and executive powers. That is perhaps so, but the explanation of it rests not on a theoretical rejection of the doctrine but upon the text of the Constitution as expounded in a series of cases culminating in *Dignan's* case,[9] from which the majority judgment in the present case cites significant passages. It is worth noting that in the judgment of Gavan Duffy C.J. and Starke J. in that case a distinction is made between the union of legislative and executive power on the one hand and the union of judicial and other power on the other hand. "It does not follow that, because "the Constitution does not permit the judicial power of the "Commonwealth to be vested" etc., are the opening words of a passage in which the granting of a regulative power akin to a legislative power to a body other than Parliament itself was justified.[10] Nor, if any further justification is sought than that of the text itself of the Constitution, would it be difficult to find a distinction. The delegation of regulative power by the legislature to an executive body does not mean that the legislature has abdicated a power constitutionally vested in it. For the executive body is at all times subject to the control of the legislature. On the other hand, in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard.

Reference at this stage may conveniently be made to an illuminating case, *In re Judiciary & Navigation Acts*.[11] That Act purported to give the High Court jurisdiction to hear and determine any question of law as to the validity of a federal law which the Governor General might refer for hearing and determination and to make the determination final and conclusive and subject to no appeal. The Act was held to be invalid. The jurisdiction purported to be given was treated as judicial power but as a judicial power falling outside the judicial power which alone could under Chapter III of the Constitution be conferred upon a court. It is, as is pointed out in the majority judgment in the present case, at least a question whether any judicial power in a real sense was conferred by the Act: for it might truly be said that what the Governor General was empowered to refer was rather an academic question than a justiciable issue. But it was treated as judicial power and upon that footing the Act was held invalid. The High Court justly observes that it would be strange indeed if the Parliament was incompetent to vest in the judicature judicial power outside the provisions of Chapter III but competent to vest in it executive or other powers. Would the result, it might be asked, have been different, if the High Court in the case cited had taken the alternative view that the Act does not purport to confer judicial power? It is possible that the case may have a deeper significance. For it has by many been thought an unwise practice to try to anticipate judicial decisions extra-judicially by obtaining the opinion or advice of the judges, the reason being that it is regarded as tending to sap their independence and impartiality. More serious objection may for the same reason be taken to vesting in them powers which, if exercised by another, would be open to challenge on all the grounds that are available to a citizen who thinks his rights have been infringed. For it is their own executive act which they may be invited judicially to examine.

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[8] (1903) 1 C.L.R. 1, 10.
[9] 46 C.L.R. 73.
[10] 46 C.L.R. 84.
[11] (1921) 29 C.L.R. 257.

These considerations lead directly to a question which is of the utmost importance because it has a close bearing upon the dissentient judgment of Williams J. If the judicial power can (contrary to their Lordships' opinion) be united in one body with other powers beyond those prescribed by section 51 (xxxix), with what powers can it be so united? There have, no doubt, from time to time been judicial statements that such a union is possible. In *Dignan's* case,[12] for example, Evatt J. said in general terms that a court set up by the Federal Parliament might exercise non-judicial functions, though he clearly did not mean any and every non-judicial function. In other cases it has been suggested that the union is possible so long as the power joined to the judicial power is not "incompatible" or "inconsistent" with it: see, for example, the judgment of Latham C.J. in *The*

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[12] 46 C.L.R. 73.

King v. *Federal Court of Bankruptcy; Ex parte Lowenstein.*[13] But in the present case it became necessary to face the question squarely and ask what was the test of legitimate union. It fell to Mr. Menzies, who argued the case with conspicuous ability, to answer the question. His answer was that any power might be joined with the judicial power which was not inconsistent with its exercise. Pressed to say what in this context "inconsistent" meant, he replied that he meant any power which it would be contrary to natural justice for the judicial authority to exercise. It appears to their Lordships very difficult to determine the intended scope of this exception, but it would be reasonable to include within it any combination of functions in which a tribunal might be both actor and judge. The fundamental principle which makes such a combination appear contrary to natural justice is not remote from that which inspires the theory of the separation of powers. Far different was the test suggested by Williams J. Generally he acceded to the appellants' contention that judicial power might be united in the same body with other powers. But after referring to the decision under section 122 of the Constitution (which will be later briefly examined) he said[14]: "This being so, it would be irrational to imply a prohibition "against the Parliament imposing similar functions on federal "courts by legislation under section 51. In each case the implied "limitation must be the same. The functions must not be func"tions which courts are not capable of performing consistently "with the judicial process. Purely administrative discretions "governed by nothing but standards of convenience and general "fairness could not be imposed upon them. Discretionary judg"ments are not beyond the pale but there must be some standards "applicable to a set of facts not altogether undefined before a "court can hear and determine a matter." Here the word "inconsistent" is used, but apart from their common use of this word there is little similarity between the conclusion to which Williams J. came and the case as presented upon appeal to their Lordships' Board. If there is any other similarity it lies in this, that the very functions, whose joinder with judicial power the learned judge would prohibit, closely resemble the functions of conciliation and arbitration which are joined with judicial power in the impugned Act. In the result it appears that either test, vague and unsatisfactory though it is, may yet be fatal to the appellants' case. Their Lordships, however, prefer to abide by the text of the Constitution which neither under Chapter III alone nor under that chapter aided by section 51 (xxxix) supports the one test or the other. Their view is reinforced by the obvious difficulty of arriving at a sure conclusion if it is sought by implication to read something into the Constitution which is not there.

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[13] (1938) 59 C.L.R. 556, 566.

[14] 94 C.L.R. 315.

In his dissentient judgment Taylor J. makes a somewhat different approach to the problem. He accepts the view that Parliament may not confer upon courts powers which are essentially legislative or executive in character except in so far as they are strictly incidental to the performance of their judicial functions. "The investing of courts" he says "with such "powers would clearly be in conflict with constitutional prin-"ciples and, in turn, judicial authority."[15] Here is a clear denial of the appellants' case which demands any union short of inconsistency, and here, too, another illustration of the dangers that beset a departure from the straight path of interpretation. But the learned judge, while maintaining that judicial functions could not be united with essentially legislative or executive power, was of opinion that such arbitral functions as were conferred by the Act upon the court did not bear the indelible imprint of legislative or executive character, and accordingly in the absence of any clear provision or implication to the contrary in the Constitution it was competent for Parliament to combine such functions with the exercise of judicial power. He was fortified in this opinion by the consideration that, as it appeared to him, the arbitral functions both in their nature and exercise presented a number of features which are characteristic of judicial functions.

In their Lordships' opinion this approach to the question cannot be supported. The conferment of judicial power is limited by the express enactment of Chapter III aided by section 51 (xxxix): it is not to be regarded as unlimited except so far as it is expressly prohibited. It is not only functions "essen-"tially" legislative or executive in character which cannot be conferred upon a court: only those judicial functions can be so conferred which fall within Chapter III and section 51 (xxxix). This does not mean that there may not be room for controversy what are "powers incidental to the execution of any power vested "by this Constitution . . . in the Federal Judicature" within section 51 (xxxix) (as may be seen from the judgments in *Lowenstein's* case[16]) nor even (despite the classic and widely accepted definition given by Griffith C.J. in *Huddart, Parker &*

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[15] 94 C.L.R. 341.

[16] 59 C.L.R. 556.

Co. Pty. Ltd. v. *Moorehead*[17]) what is the precise scope and meaning of judicial power. But whatever latitude may be given in either of these directions, it does not appear to their Lordships that the appellant's case is advanced. They must wholly dissent from the view that arbitral functions (as that expression is here used) have any relevant similarity to judicial functions. The essential difference has already been pointed out. Such facts as that the same qualities of fairness, patience and courtesy should be exhibited by conciliator, arbitrator or judge alike, and that none of them should act without hearing both sides of the case do not weigh against the fact that the exercise of the judicial function is concerned, as the arbitral function is not, with the determination of a justiciable issue. But it must be added that the judgment of the learned judge indicated that in his view there were powers which could not be brought within the description of legislative, executive or judicial (or presumably be described as incidental to the execution of such powers) and that it was this fourth category of powers in particular that could be united with judicial functions. But if, as their Lordships think, the true criterion is not what powers are expressly or by implication excluded from the scope of Chapter III, but what powers are expressly or by implication included in it, it is irrelevant whether there is such a fourth category. Even if there is, it is outside Chapter III, except in those matters which are incidental to the execution of the judicial power. With regard to the possible width of this exception their Lordships would say nothing to qualify what fell from the High Court in *Queen Victoria Memorial Hospital* v. *Thornton*[18] and *The Queen* v. *Davison*.[19] Their Lordships would endorse what was said in the former case by the High Court[20]: "Many functions perhaps may be committed to "a court which are not themselves exclusively judicial, that is "to say which considered independently might belong to an "administrator. But that is because they are not independent "functions but form incidents in the exercise of strictly judicial "powers."

Reference must be made here to two matters relied on by the appellants, the one as inconsistent with the interpretation placed on Chapter III, the other as illustrating the substantial departure from the principle of the separation of powers which has taken place.

The first matter relates to the decision of the High Court admitting an appeal from the courts established by Parliament in the territories of the Commonwealth. By Chapter VI of the Constitution, which is headed "New States," it is provided (by section 121) that the Parliament may admit to the Commonwealth or establish New States and may upon such admission or establishment make or impose such terms and conditions as it thinks fit, and (by section 122) that the Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth or of any territory placed by the Queen under the authority of and accepted by the Commonwealth. Under this power the Parliament has made legislative provision for an appeal from the courts of the territories to the High Court, and the validity of such a law has been upheld. If this is right, so runs the argument, the provisions of Chapter III cannot be an exhaustive statement of the jurisdiction of the High Court, and reference is made to such cases as *Rex* v. *Bernasconi*[21] and *Porter* v. *The King*.[22] It appears to their Lordships that these decisions (the latter of which was not reached without difficulty and dissent) can be satisfactorily reconciled with the opinion they have formed in the present case by regarding Chapter III as exhaustively describing the federal judicature and its functions in reference only to the federal system of which the territories do not form part. There appears to be no reason why the Parliament, having plenary power under section 122, should not invest the High Court or any other court with appellate jurisdiction from the courts of the territories. The legislative power in respect of the territories is a disparate non-federal matter. If in regard to it an exception is made to the exclusiveness of Chapter III, it has no bearing upon the problem which faces their Lordships.

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[17] (1909) 8 C.L.R. 330.

[18] (1953) 87 C.L.R. 144.

[19] (1954) 90 C.L.R. 353.

[20] 87 C.L.R. 151.

The other matter to which their Lordships must refer has already been mentioned. It is the departure from the principle of separation of powers in matters legislative and executive. They refer to this matter again lest it should be thought that in anything they have said in relation to the judicial power they intended to cast any doubt upon the line of authorities where the union of legislative and executive power has been considered. Reference has already been made to *Dignan's* case,[23] and a salient passage from it cited. From the same case in exhaustive judgments of Dixon J. and Evatt J. many other passages will be found which illustrate how different are the measures which have been and ought to be meted out to the union of legislative and executive powers on the one hand and the union of such powers and judicial power on the other. Two instances must suffice. Dixon J.,[24] after asserting the essential proposition that the Parliament is restrained both from reposing any power essentially judicial in any other organ or body and from reposing any other than that judicial power in such tribunals, and referring to the vesting of the legislative power of the Commonwealth in the Parliament asks: "Does it follow that in the exercise of that "power the Parliament is restrained from reposing any power "essentially legislative in another organ or body?" and after a review of the authorities concludes that the Constitution does not forbid the statutory authorization of the executive to make a law. In part at least this is justified in these words [25]: "The existence "in Parliament of power to authorize subordinate legislation may "be ascribed to a conception of that legislative power which "depends less upon juristic analysis and perhaps more upon the "history and usages of British legislation and the theories of "English law." A passage from the judgment of Evatt J. (who generally took a more liberal view of the union of powers) may also be cited. He said [26]: "The observation of Isaacs J. (as he "then was) that there is a 'separation' of powers only 'to a "'certain extent' has a special application when the question "concerns the exercise of legislative functions and powers by "executive bodies. Questions of judicial power occupy a place "apart under the Constitution, not only because of the special "nature of judicial power but because of the elaborate provi- "sions of Chapter III. As Sir W. Harrison Moore has pointed "out in his well-known work on the Australian Constitution "'between legislative and executive power on the one hand and "'judicial power on the other, there is a great cleavage.'"

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[21] (1915) 19 C.L.R. 629.

[22] (1926) 37 C.L.R. 432.

[23] 46 C.L.R. 73.

Finally, it is necessary to consider an aspect of this difficult case which has been in the forefront of the appellants' argument. And it can best be introduced by a brief history of the legislation which, when these proceedings were started, had assumed the form of the Conciliation and Arbitration Act, 1904 to 1952. Their Lordships will refer only to the immediately relevant changes that have been made since the Act was first enacted under its present title as No. 13 of 1904. The objects were stated in seven headings and did not refer to the enforcement of awards or any other judicial process. By section 11 it was enacted that there should be a Commonwealth Court of Conciliation and Arbitration which should be a court of record and should consist of a President who was to be appointed from among the justices of the High Court and was to hold office for seven years. The court and the President were fully equipped with the functions of conciliation and industrial arbitration. The Act created a number of specific offences which were punishable by summary proceedings before courts exercising federal jurisdiction. But power plainly judicial was conferred upon this court itself to impose penalties for breaches or non-observance of orders and awards which were proved to the satisfaction of the court to have been committed. Between 1904 and 1918 the Act was amended by conferring further judicial power on the court by provisions corresponding with the sections 29 (1) (*b*) and 29 (1) (*c*) and 29A of the present Act. In 1918 came *Alexander's* case (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.*[27]). It was in that case decided that as section 72 of the Constitution requires that judges of federal courts created by Parliament should be given life tenure and as the judges of the court had not been given such tenure, they could not exercise any part of the judicial power of the Commonwealth. Great importance has been attached by counsel for the appellants to the fact that no attack was made on the conjunction of judicial and arbitral functions in the court. After *Alexander's* case [27] the Act was amended so as to remove from the court to courts exercising the judicial power of the Commonwealth some at least of the powers which had been invalidly conferred on the court. Thus the matter rested for nearly eight years, the court continuing to exercise its conciliation and arbitral functions under the Act as amended.

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[24] 46 C.L.R. 73, 98.
[25] Ibid. 101.
[26] Ibid. 117.

In 1926 important amendments of the law were made by Act No. 22 of 1926. It is sufficient to say of it and the many subsequent amending Acts that by 1952 the court has assumed the form and been invested with the powers which have already been described. It remains the same court throughout; its primary function was at all times the settlement of industrial disputes by conciliation and arbitration, but unmistakably from 1926 onwards it was invested with, and exercised, judicial power; not indeed always the same measure of judicial power, for section 29A was only inserted after 1951, but power which was indubitably part of the judicial power of the Commonwealth.

It is therefore asked, and no one can doubt that it is a formidable question, why for a quarter of a century no litigant has attacked the validity of this obviously illegitimate union. Why in *Alexander's* case[27] itself was no challenge made? How came it that in a series of cases, which are enumerated in the majority and the dissentient judgments, it was assumed without question that the provisions now impugned were valid?

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[27] 25 C.L.R. 434.

It is clear from the majority judgment that the learned Chief Justice and the judges who shared his opinion were heavily pressed by this consideration. It could not be otherwise. Yet they were impelled to their conclusion by the clear conviction that consistently with the Constitution the validity of the impugned provisions could not be sustained. Whether the result would have been different if their validity had previously been judicially determined after full argument directed to the precise question and had not rested on judicial dicta and common assumption, it is not for their Lordships to say. Upon a question of the applicability of the doctrine of stare decisis to matters of far-reaching constitutional importance they would imperatively require the assistance of the High Court itself. But here no such question arises. Whatever the reason may be, just as there was a patent invalidity in the original Act which for a number of years went unchallenged, so for a greater number of years an invalidity which to their Lordships as to the majority of the High Court has been convincingly demonstrated, has been disregarded. Such clear conviction must find expression in the appropriate judgment.

Their Lordships must now return to a question the discussion of which has been postponed. The respondents, though they did not appear by counsel at the hearing of the appeal, put in a formal case and in it submitted that the appeal was not competent in that it raised an inter se question and the High Court had not given a certificate under section 74 of the Constitution that the question was one which ought to be determined by Her Majesty in Council.

The issue, then, is whether there is involved in this appeal "any question, howsoever arising, as to the limits inter se of the "constitutional powers of the Commonwealth and those of any "State or States." More narrowly stated, the issue is whether the validity or invalidity of those sections of the Act which purport to give the court judicial power is a question as to the limits inter se of the constitutional powers of the Commonwealth and the States respectively.

It appears to their Lordships that this issue does not raise an inter se question. They would not in any way narrow the scope of those questions which are reserved to the High Court, subject to its own discretionary power to grant a certificate. But if the wide test, which has become the settled interpretation of the section, is adopted, it cannot fairly be held to cover the present case. That test, so far as relevant, is whether the decision under appeal is a decision upon the extent of a paramount power of the Commonwealth over the concurrent powers of the States. If the power is one the exercise of which is denied to Commonwealth and States alike, for example, because section 92 invalidates it, no inter se question arises. If the power is one, of which the exercise is exclusively vested in the Commonwealth, no such question arises. It is only where the delimitation of the Commonwealth power necessarily implies a decision as to the extent of a subordinate State power that an inter se question truly arises. For in such a case the advance of the Commonwealth power must pro tanto reduce the State power.

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[27] 25 C.L.R. 434.

If that test is applied here, it appears to their Lordships that a decision for or against the validity of the impugned sections neither advances the Commonwealth power nor reduces the State power. It is undeniable that it is competent for the Commonwealth Parliament by appropriate legislation to provide for the enforcement of the awards of the Conciliation and Arbitration Court and for the punishment of a breach of them. It cannot be said that what has been described as the undefined residue of absolute and uncontrolled power remaining to the States is in any real sense affected by a decision that a power which might have lawfully been exercised in one way has been unlawfully exercised in another way. It is implicit in an inter se question that between the powers of Commonwealth and State there should be a mutual relation and a reciprocal effect. Neither of those features are present in a question the answer to which, whatever it may be, will not alter the boundaries of the respective powers. In these circumstances their Lordships, though they have carefully weighed the arguments advanced by the respondents in their formal case, have concluded that section 74 of the Constitution has no application to the question before them.

Having taken the matter into their consideration accordingly, they will humbly advise Her Majesty that this appeal should be dismissed.

Solicitors: *Coward, Chance & Co.; Waterhouse & Co.*

C. C.

J. C.*

1957
Mar. 25.

RATU TAITO NALUKUYA . . . . APPELLANT;

AND

DIRECTOR OF LANDS AND ANOTHER . . RESPONDENTS;

AND

NATIVE LAND TRUST BOARD OF FIJI . INTERVENER.

ON APPEAL FROM THE FIJI COURT OF APPEAL.

Compulsory Purchase—Compensation—Meaning—Whether "purchase "money on sale or other disposition"—"Purchase"—"Sale"—"Disposition"—Fiji—Compulsory acquisition—Native land—Compensation money—Payable to Native Land Trust Board—Not to members of Tokatoka (Native land holding unit)—Observations on distribution of compensation—Crown Acquisition of Lands Ordinance (Laws of Fiji, 1945, *c.* 122), *s.* 3*—Native Land Trust Ordinance (Laws of Fiji,* 1945, *c.* 86), *ss.* 15, 32*—Native Land (Leases and Licences) Regulations, reg.* 3 (2).

Fiji.

Compensation money payable on the compulsory acquisition of native land in Fiji under the Crown Acquisition of Lands Ordinance, c. 122 of 1945—which does not provide to whom such compensation is to be paid—is covered by the words "the purchase "money received in respect of a sale or other disposition of native "land" in section 15 of the Native Land Trust Ordinance, c. 86 of 1945, and accordingly such money is to be paid under that section to the Native Land Trust Board of Fiji for investment and distribution of the proceeds as that board may decide.

In disposing of the money the better course for the board would be to follow the relevant statutory regulations in force in Fiji in the light of local native customary tenure without reference to cases which have arisen in other jurisdictions.

The provision in section 3 (2) of the Native Land (Leases and Licences) Regulations (made under section 32 of the Native Land Trust Ordinance) that, unless the board otherwise decides, the purchase money is to be distributed in the same manner as rents and premiums, would seem to be illogical having regard to the nature of the tenure by a Tokatoka (a native land holding unit), and it might be considered whether some amendment of the regulations is not desirable.

Kirkness v. *John Hudson & Co. Ltd.* [1955] A.C. 696; [1955] 2 All E.R. 345 considered.

Judgment of the Fiji Court of Appeal affirmed.

APPEAL (No. 30 of 1955) from a judgment of the Fiji Court of Appeal (November 16, 1954) setting aside an order of the Supreme Court of Fiji (Ragnar Hyne C.J.) (March 19, 1954).

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* *Present*: LORD OAKSEY, LORD TUCKER, LORD SOMERVELL OF HARROW and MR. L. M. D. DE SILVA.

J. C.
1957

NALUKUYA
v.
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OF LANDS.
NATIVE LAND
TRUST BOARD
OF FIJI,
INTERVENER.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: In the year 1944 the Governor of the Colony of Fiji acting through the first respondent, the Director of Lands, compulsorily acquired some 434 acres of land in Fiji from the Tokatoka Nadrau, a native land holding unit of which the appellant was the head, under the provisions of the Crown Acquisition of Lands Ordinance (Cap. 122 of the Laws of Fiji).

In March, 1953, the appellant issued an originating summons asking the court to determine the amount of compensation payable in respect of that compulsory acquisition. The sum of £7,985 plus £3,393 1s. 6d. interest was subsequently agreed between the parties. On July 7, 1953, the appellant issued a summons for directions seeking the court's approval of the compromise on behalf of his infant children and directions as to the application of their share of the said sum, and for an order that the shares of the appellant and of the other adult members of the Tokatoka Nadrau be paid to them respectively to be applied by them as they thought fit.

The summons was later amended at the instance of the Solicitor-General on behalf of the first respondent so as to provide for an order for payment into court of the total sum of £11,378 1s. 6d. under section 18 of the Crown Acquisition of Lands Ordinance. The said sum was by consent subsequently paid into court with the result that the government was by section 18 of the Ordinance discharged from seeing to its application or being answerable for its misapplication.

The matter came on for hearing before Ragnar Hyne C.J. on February 17, 1954, when the following issues were prepared and agreed: (1) Should the capital or any part of the fund in court be paid to the present members of the Tokatoka Nadrau? and (2) if not, to whom should the same be paid?

The Chief Justice, after hearing evidence as to the nature of customary land tenure by the members of a Tokatoka, decided that the provisions of the Native Land Trust Ordinance were not applicable to this compulsory acquisition and that he accordingly could not order the payment of the money to the Native Land Trust Board. Having regard, however, to the nature of the tenure of land by a Tokatoka, after providing for the disposal of the £3,393 1s. 6d. interest (as to which no question now arose) he ordered that the capital sum of £7,985, subject to certain deductions for costs and disbursements, be paid to the Public Trustee for investment and the interest therefrom distributed half-yearly amongst the members of the Tokatoka living at the time of each distribution.

From that order the appellant appealed to the Court of Appeal (Carew P., Macaskie and Higginson JJ.). At the hearing of the appeal it was agreed by the parties and accepted by the court that the Public Trustee had no power to deal with this sum as directed by the Chief Justice and accordingly his order could not stand. The court decided that the provisions of section 15 of the Native Land Trust Ordinance applied to compensation money payable under the Crown Acquisition of Lands Ordinance and ordered that the said sum be paid to the Native Land Trust Board thereunder.

On January 21, 1955, the appellant obtained leave from the Court of Appeal to appeal to Her Majesty in Council, and by Order in Council dated March 22, 1956, the Native Land Trust Board was granted leave to intervene.

The Crown Acquisition of Lands Ordinance gave power by section 3 to the Governor to acquire any lands required for any public purpose " paying such consideration or compensation as " may be agreed upon or determined under the provisions of this " Ordinance."

This power was not confined to native land. Section 4 gave the Governor power to acquire native land without compensation to a certain amount and for certain purposes. The Ordinance went on to provide the necessary machinery for acquisition by service of notice and for determining the amount of compensation in default of agreement. Section 11 provided for the registration of the Crown as proprietor and the issue of a certificate of title in the name of the Director of Lands upon presentation to the Registrar of Titles of a certified copy of any judgment or order of the court made under section 9, which section gave power to the Supreme Court to settle disputes as to compensation and title. The Ordinance made no provision for registration of title where compensation was agreed and no order of the court obtained, nor did it provide to whom the compensation was to be paid in the case of acquisition of native land.

The following provisions of the Native Land Trust Ordinance required to be set out or referred to: In section 2, if not inconsistent with the context, " ' native land ' means land which is " neither Crown land nor the subject of a Crown or native grant " but includes land granted to a mataqali under section 19 of " this Ordinance. ' Native owners ' means the mataqali or other

" division or sub-division of the natives having the customary " right to occupy and use any native land. . . . "

Section 5 provided that all native land should be vested in the Native Land Trust Board and should be administered by the board for the benefit of the native owners. Section 6 enacted that " native land shall not be alienated by native owners " whether by sale, grant, transfer or exchange except to the " Crown."

Section 8 read: " Subject to the provisions of the Crown " Acquisition of Lands Ordinance, the Forest Ordinance, the " Oil Mines Ordinance and the Mining Ordinance, no native land " shall be sold, leased or otherwise disposed of and no licence " in respect of native land shall be granted save under and in " accordance with the provisions of this Ordinance."

Section 15 of 1944 read as follows: " Rents and premiums " received in respect of leases or licences in respect of native land " shall be subject to a deduction of ten per centum, which shall " be payable to general revenue as and for the expenses of " collection and administration, and the balance thereof shall be " distributed in the manner prescribed, and the purchase money " received in respect of a sale or other disposition of native land " shall either be distributed in the manner prescribed or invested " and the proceeds so distributed as the board may decide."

There followed certain provisos which need not be set out. Section 17 read: " Subject to the provisions of the Crown " Acquisition of Lands Ordinance, the Forest Ordinance, the Oil " Mines Ordinance and the Mining Ordinance, no land in any " native reserve shall be leased or otherwise disposed of," followed by a proviso.

Section 32 gave the Governor in Council power to make regulations for all matters required to be prescribed. Under that section regulations had been made as follows: Regulation 3 of the Native Land (Leases and Licences) Regulations, after providing for a percentage deduction from all moneys received for rents and premiums in respect of leases or licences of native land for expenses of collection and administration, went on to prescribe the proportions in which the balance was to be distributed amongst certain named bodies or persons, of whom the final recipient of 12s. in every pound was the mataqali or, when the mataqali was sub-divisible into Tokatokas, the members of the Tokatoka owning the land in question. Sub-clause (2) of the regulation then read: (2) " The purchase money received " in respect of a sale or other disposition of native land shall, "unless the board decides that it shall be invested and the "proceeds distributed in some other way, be distributed in the "manner set out in the preceding sub-regulation for the distribu-"tion of the balance of rents and premiums."

1957. Feb. 25, 26. *Phineas Quass Q.C.* and *T. O. Kellock* for the appellant. The sole question is to whom the sum of £7,985, being compensation due from the Government of Fiji for the compulsory acquisition of 434 acres of native land from the Tokatoka Nadrau should be paid. The appellant submits that it should be paid to the members of the Tokatoka Nadrau to whom the land belonged and of which the appellant is the head and on whose behalf he is suing. Land in Fiji, generally speaking, is communally owned; the unit of ownership was formerly thought to be a mataqali, but now it appears to be accepted that the unit is something smaller, namely, the Tokatoka. The mataqali consists of a number of Tokatoka; the latter may contain only one family or more than one family—it is a family in a rather extended sense. The appellant's Tokatoka consists of himself, his two adult sisters, an adult cousin and his (the appellant's) five children.

Sometimes one found in the Ordinances relating to native land an absolute prohibition of alienation by native owners except to the Crown, and at other times there was no absolute prohibition but they had to get the consent of the Crown. It varied from time to time. In none of the Ordinances was the native owner free to alienate land as he pleased. The Native Lands Ordinance, No. 4 of 1905, s. 17, e.g., shows that a native owner is able to give a good title in fee simple to a grantee with the permission of the Crown; that hardly fits in with the idea of a person having only a life interest. Section 6 of the Native Land Trust Ordinance (Laws of Fiji, 1945, c. 86), which provides that a native owner may sell his land to the Crown, has nothing whatever to do with the case of compulsory acquisition, which is dealt with in the Crown Acquisition of Lands Ordinance, c. 122, which, it is submitted, is a self-contained Ordinance. A distinction is to be drawn between compensation for compulsory acquisition and purchase price on a sale to the Crown.

Nowhere in any of the sections of the Crown Acquisition of Lands Ordinance are the words "purchase price" or "purchase "moneys" used, and only in section 3 is the word "considera-"tion," which is consistent with "sale," used. The draftsman has carefully used the word "compensation," which is not

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applicable to a case of sale at all. All sorts of elements may be taken into consideration in the case of compulsory acquisition which are absent in the case of an ordinary sale. The money received in respect of this compulsory acquisition is not "purchase money received in respect of a sale or other disposition "of native land" within section 15 (2) of the Native Land Trust Ordinance. "Disposition" is not defined in the Ordinances, and unless the context otherwise requires it does refer to something done by act of the parties, though if the context does otherwise require, it may have a wider meaning: *Deddington Steamship Co. Ltd.* v. *Inland Revenue Commissioners* [1]; *Duke of Northumberland* v. *Attorney-General* [2]; Stroud's Judicial Dictionary. As to "sale and acquisition," see *Kirkness* v. *John Hudson & Co. Ltd.*[3] This transaction was a compulsory acquisition of land under the Crown Acquisition of Lands Ordinance and does not come within the phrases "otherwise disposed of" or "other disposition" in sections 8 and 15, as amended, of the Native Land Trust Ordinance; "purchase money" in section 15 of the latter Ordinance does not include compensation payable in respect of compulsory acquisition; nor does the word "acquired" in section 7 of that Ordinance apply to compulsory acquisition. Accordingly, the Native Land Trust Ordinance has no application to this case, and there are no statutory provisions authorizing the payment of the compensation to the intervener, the Native Land Trust Board. If it is held that the compensation money has to be paid to the board it is conceded that the appellant cannot rely on the rule against perpetuities to save it: *Cooper* v. *Stuart.*[4]

T. O. Kellock followed.

D. A. Grant for the respondent, the Director of Lands. The attitude taken by the Attorney-General in the Court of Appeal was that it was the interest of the Crown in this case that there should be a restraint on the spending of this money by the owners of the land. The Crown considered it right to urge that payment should be made to the Native Land Trust Board; it would be wrong that the native owners should be entitled to squander moneys given to them in these circumstances. The submission of the Crown is that in the context of the Native Land Trust Ordinance the words "purchase money received in respect of "a sale or other disposition of native land" in section 15 (2) include compensation or consideration received in respect of an acquisition of native land under the Crown Acquisition of Lands Ordinance. Those are wide words intended to cover any conveyance made by native owners to the Crown. There is nothing in any of the cases referred to for the appellant which cuts down the word "disposition" to some voluntary act of the parties. Section 8 of the Native Land Trust Ordinance is also in the respondent's favour. It would be quite wrong that payment should be made to the appellant and the other members of the Tokatoka.

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[1] [1911] 1 K.B. 1078.

[2] [1905] A.C. 406; 21 T.L.R. 639.

[3] [1955] A.C. 696; [1955] 2 All E.R. 345.

[4] (1889) 14 App.Cas. 286, 291.

B. Gillis Q.C. and *William Denny* for the intervener, the Native Land Trust Board. The trust law created by the Native Land Trust Ordinance was brought into being for the express purpose of the control and administration of native land for the benefit of the native owners: section 5. Section 15 of that Ordinance provided the duties of the board with regard to all moneys which might be paid in respect of native land, and the board has the obligation of investing it and distributing the proceeds in accordance with the section and the regulations. The basic principle underlying the Ordinances relating to alienation of land in Fiji is that the customary heritage of the Tokatoka is to be preserved. The submission is that the members of the Tokatoka or mataqali are described as owners in the sense that they are entitled to the beneficial use and occupation of native land. From the argument for the appellant the situation would appear to be that succeeding generations would be deprived of their customary heritage. The intervener's submission is as stated in the judgment of the Court of Appeal: "The Attorney-"General . . . contended that having regard to the intention "of the Native Land Trust Ordinance, the words 'otherwise "'disposed of' should be given the widest meaning; that they "should accordingly be construed to include a compulsory "acquisition of native land; and consequently the Native Land "Trust Ordinance should apply." It was said in the *Duke of Northumberland's* case[5] that "in many cases the purpose of the "Act would be defeated unless you give to the term 'disposition' "the largest possible significance." If the Board think that "disposition" must contain an act of the parties, then it is submitted that on the facts in this case there was a sufficient act of the parties. [The *Kirkness* case[6] was also referred to.]

The Court of Appeal were right in their interpretation of sections 8 and 15 of the Native Land Trust Ordinance; the provisions of that Ordinance apply to compulsory acquisition of native land, and this intervener is entitled to be paid the £7,985, to be applied in accordance with the provisions of the Ordinance and the relevant regulations made thereunder. In that connexion the Court of Appeal invited the attention of the board to two West African cases, *Amodu Tijani* v. *Secretary, Southern Nigeria*,[7] and *Sakariyawo Oshodi* v. *Moriamo Dakolo*.[8] The title enjoyed by the native owners there, however, was entirely different from that in Fiji.

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[5] [1905] A.C. 406, 411.

[6] [1955] A.C. 696, 737.

Quass Q.C. in reply. The Board have not sufficient material to say that the tenure of land in Fiji is the same as that of land in Nigeria, though it may well be that the Nigerian cases do form a guide. The Crown Acquisition of Lands Ordinance is a complete code and there is no need to go to the Native Land Trust Ordinance; the former from beginning to end does not mention the Native Land Trust Board, which had nothing to do with compulsory acquisition.

March 25. The judgment of their Lordships was delivered by Lord Tucker, who stated the facts set out above and continued: The validity or invalidity of the order made by the Court of Appeal depends upon the proper construction of the words "the "purchase money received in respect of a sale or other "disposition of native land" appearing in section 15. Is compensation money payable on the compulsory acquisition of land covered by these words?

Little assistance is to be obtained from the citation of authorities with regard to the meaning of the word "disposition" in other contexts, but it is perhaps worth noticing that several of the speeches in the case of *Kirkness* v. *John Hudson & Co. Ltd.*[1] recognize that in the field of compulsory acquisition of land such words as "sale" and "purchase" are frequently used in connexion with transactions by which the transfer of ownership in land takes place in the absence of the element of mutual assent.

It is in this special context that the words "purchase money "received in respect of a sale or other disposition of native land" in section 15 of the Native Land Trust Ordinance fall to be construed, since their Lordships agree with the Court of Appeal in thinking that the presence of the words "otherwise disposed "of" in conjunction with a reference to the Crown Acquisition of Lands Ordinance in section 8 widens the context in which the words " other disposition " in section 15 appear.

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[7] [1921] 2 A.C. 399.

[8] [1930] A.C. 667; 46 T.L.R. 599.

[1] [1955] A.C. 696; [1955] 2 All E.R. 345.

The repetition of the language in section 17 set out above gives further support to this view. Once the conclusion is reached that " other disposition " does not exclude a disposition which results from compulsory acquisition the presence of the words " purchase money " without the addition of the words " or compensation " present little difficulty. The drafting is, of course, not as precise as it might be, but it is difficult to believe that it was intended that the careful provisions safeguarding the proceeds of voluntary sales of native land to the Crown should not equally apply to the compensation payable on compulsory purchase of such land. In the result their Lordships agree with the conclusion reached by the Court of Appeal on the construction of section 15.

It has been argued at some stages in this case that payment to the intervener would in some way infringe the rule against perpetuities, but assuming that this rule might otherwise apply to the proceeds of sale of native land, there is express statutory authority in section 15 for the investment of such moneys and the distribution of the proceeds as the board may decide. Their Lordships are not required to give any decision as to the manner in which the intervener should dispose of the money in its hands, but reference was made in the Court of Appeal to two decisions of the Privy Council in cases from West Africa to which the attention of the intervener was invited. Their Lordships have not sufficient material before them with regard to the tenure of native land in Fiji to judge whether these cases are likely to afford any guidance to the intervener in the present or any future case, but they would consider that the better course for the intervener would be to follow the relevant statutory regulations in force in Fiji in the light of local native customary tenure without reference to cases which have arisen in other jurisdictions.

The relevant regulations have been referred to above, and it is perhaps worth noting that unless the board otherwise decides the purchase money is to be distributed in the same manner as rents and premiums. This would seem illogical having regard to the nature of the tenure by a Tokatoka, and it may be that those responsible for these regulations might consider whether some amendment is not desirable.

For the reasons stated above their Lordships will humbly advise Her Majesty that the appeal be dismissed.

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OF LANDS.
NATIVE LAND
TRUST BOARD
OF FIJI,
INTERVENER.

The appellant must pay the intervener's costs of the petition for leave to intervene and one set of costs of the appeal to be shared between the first respondent and the intervener as to one-third to the first respondent and two-thirds to the intervener.

Solicitors: *Graham Page & Co.; Charles Russell & Co.; Hy. S. L. Polak & Co.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*

1956
Apr. 23, 24,
25, 26;
June 21.

SOUTHERN RAILWAY OF PERU LTD. . . APPELLANT;

AND

OWEN (INSPECTOR OF TAXES) . . . RESPONDENT.

Revenue—Income tax—Profits of trade—Contingent liability—Payments of compensation to employees at end of service—Claim to charge sums against profits in each accounting period—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases I and II.*

Under the legislation of Peru an English company operating a railway there was bound to pay its employees compensation on the termination of their services, the legislative provisions being deemed to be incorporated into all contracts of service. The right arose on dismissal or on termination of the employment by the employee by proper notice, or on such termination by the death of the employee or on the expiry of the term of the employment. Exceptions were (a) in the case of fixed term contracts, where the contract was determined by the employee before the expiry of the term otherwise than on account of infringement by the company, and (b) in the case of all contracts of service, where there had been wrongful conduct of certain kinds by the employee (e.g., dishonesty or insubordination). The compensation was an amount equivalent to one month's salary at the rate in force at the date of determination for every year of service. The company claimed to be entitled to charge against each year's receipts the cost of making provision for the retirement payments which would ultimately be thrown on it, calculating what sum would be required to be paid to each employee if he retired without forfeiture at the close of the year and setting aside the aggregate of what was required in so far as the year had contributed to the aggregate:—

Held, that the company was not entitled to make the deductions sought to be made.

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* *Present*: EARL JOWITT, LORD OAKSEY, LORD MACDERMOTT, LORD RADCLIFFE and LORD TUCKER.

Per Earl Jowitt, Lord MacDermott, Lord Radcliffe and Lord Tucker. The company was entitled to charge against each year's receipts the cost of making provision for the retirement payments which would ultimately be payable as it had had the benefit of the employees' services during that year, provided the present value of the future payments could be fairly estimated.

Per Earl Jowitt, Lord Radcliffe and Lord Tucker. Since in calculating the amount which it claimed to deduct in each year the company had ignored the factor of discount, the claim should be rejected. In the circumstances it was not proper to remit the case to the Special Commissioners to find whether a satisfactory method of provision could be extracted from the evidence.

Per Lord MacDermott, dissenting. Despite this defect, it was not to be assumed that a set of acceptable deductions could not be produced, and the case should be remitted to the Special Commissioners.

Sun Insurance Office v. *Clark* [1912] A.C. 443; 28 T.L.R. 303 applied.

Decision of the Court of Appeal (1955) 34 A.T.C. 80 affirmed.

APPEAL from the Court of Appeal (Evershed M.R., Jenkins and Romer L.JJ.).

This was an appeal from an order of the Court of Appeal dated March 17, 1955, dismissing an appeal by the appellant company, Southern Railway of Peru Ltd., from an order of the Chancery Division (Upjohn J.) dated October 15, 1954, whereby an appeal by the respondent R. M. Owen (Inspector of Taxes) on a case stated for the opinion of the High Court by the Commissioners for the Special Purposes of the Income Tax Acts was allowed and their decision was reversed.

The matter arose on assessments to income tax made on the appellant company under Case I of Schedule D of the Income Tax Act, 1918, for the years 1947–1948 to 1951–1952 inclusive, in respect of profits arising from its trade, which was that of operating and controlling a railway in Peru. The point in dispute related to the principle on which the profits should be computed with reference to certain payments which the appellant company made, under the laws of the Republic of Peru, to its employees on their retirement from their service with it. Shortly stated, the question was whether (as the respondent contended and the courts below had decided) the amounts to be deducted as outgoings in each year of account were the payments made or actually owing to an employee who had retired in that year, or whether (as the appellant company contended and the Special Commissioners had decided) the amounts to be deducted were a proportionate amount of each payment estimated as ultimately to be

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paid on retirement, on the basis of that proportionate amount having accrued at the end of each period of account, though the employee had not retired and was still in the service of the appellant company.

The appellant company operated its railway under the obligations of a statutory scheme by virtue of which, generally speaking, its employees were entitled to receive from it a lump sum payment on the termination of their service. In effect entitlement did not depend on any prescribed length of service. An employee could forfeit his right by wrongful conduct, such as dishonesty or insubordination or by failure to give due notice of retirement. Employees on fixed term contracts had to complete their term without breach and could only determine the contract where the employer himself was in default. No payment was exigible until the service had been terminated. The amount of benefit was arrived at by taking a prescribed proportion of the salary of the closing year of service and multiplying it by the number of years of service.

A translation of the relevant articles from the Peruvian Commercial Code was as follows:

By article 293, if contracts of service "are for a specified "period, neither of the parties may withdraw without the consent "of the other from the fulfilment thereof until the completion "of the agreed period . . ."

By article 294: "The following are special causes enabling "merchants to discharge their employees, even though the agreed "period may not have expired: (1) Fraud or breach of trust. . . . "(2) The carrying out of commercial transactions for their own "account, without the express consent or licence of the principal. "(3) Serious lack of respect and consideration in regard to the "principal or members of his family or dependants."

By article 295: "The following grounds shall enable employees "to take leave of their principals, even though the period of the "contract has not been fulfilled: (1) Non-payment of salary or "stipend at agreed periods. (2) Non-fulfilment of any other "condition agreed upon for the benefit of the employee. (3) Bad "treatment or serious insult by the principal."

Law No. 4916 enacted by article 1:

"Article 296 of the Code of Commerce is hereby modified as "follows: (A) If and when the engagement or lease of services is "not subject to a fixed term of duration, evidenced by public "deed, either party may terminate it provided that the employer "gives 90 days' prior notice to the employee or the employee "notice of 40 days to the employer. (B) If and when termination "of the engagement or lease of services should arise from a "decision to that effect on the part of the employer, thereby "giving notice of dismissal to his subordinate individual or "employee . . . the latter shall be entitled to receive salary "compensation following the scale set down below:

"Up to 2 years' service time—one month's salary.
"From 2 to 5 years' service time—two months' salary.
"From 5 to 10 years' service time—four months' salary.
"From 10 to 20 years' service time—eight months' salary.
"From 20 to 25 years' service time—10 months' salary.
"From 25 to 30 years' service time—12 months' salary."

By article 2: "In such cases where dismissal of a subordinate "individual or employee is due to any of the reasons contemplated "in article 294 of the Code of Commerce . . . he will not be "entitled to receive either the prior notice of dismissal or the "indemnity payment or benefit of any kind."

By Law No. 5119 (modifying Law No. 4916), article 2: "Provided that an employee leaves his work or post giving 40 days' "prior notice of his decision, as stipulated by article 1 of Law "No. 4916, he will still be entitled to enjoy the benefits provided "for by the said law. Only in the case of his leaving without "prior notice and voluntarily will he lose the benefits provided "for by the said law. . . ."

Law No. 6871 (Rules of Procedure under Laws 4916 and 5119) enacted by article 1: "Payment such as the employer is required "to make to his employee, in cases of dismissal provided for by "Laws 4916 and 5119 will be calculated at the rate of half a "month's salary . . . for every year's service. . . ."

By article 2: "Payment, such as is referred to in the foregoing article, from the legal viewpoint, represents a remuneration which the employer pays for the work of his employee, "whether the latter's engagement is for an indefinite period or "for a fixed time. . . ."

By article 2 of Law No. 8439 (extending Law No. 4916): "In the event of the decease of an employee, the compensation "which Law No. 4916 establishes, in respect of length of service "time . . . shall belong to the heirs of the deceased; or, in these "latter's default, to the person or persons who used to be his "dependants economically."

By Law No. 9463 (extending Laws 9416, 6871 and 8439): "A reduction in remuneration accepted by an employee shall not "impair in any way the rights acquired for services rendered as "granted under Laws Nos. 4916, 6871 and 8439, as compensation "should be calculated per years of service in accordance with "the remuneration received until the time of the reduction. "Following compensation will be calculated in accordance with "the reduced remuneration."

By Law No. 10239 previous enactments were modified "in "the sense that compensation which must be paid to business "employees, in the event of retirement or dismissal, shall be "calculated at the rate of one month's salary per yearly service "time."

Paragraph 3 (4) of the case stated set out: "In computing "the profits of the [company] for the year to June 30, 1946, no "provision was made in respect of liabilities actual or contingent "under the social legislation. . . . For the year to June 30, "1947, and subsequent years provision was made in the balance "sheet and a charge made in the revenue account. . . ."

Paragraph 3 (6) set out: "No instance had yet occurred in "which the [company] had refused to pay an employee or workman the compensation provided for in the social legislation, "either for the reasons stated in article 294 of the Peruvian "Commercial Code . . . or on any other ground." The appellant company employed a numerous staff.

The Special Commissioners found that "whatever might be "the correct legal description of the [company's] obligation "under the Peruvian social legislation with respect to the amounts "of compensation calculated to have accrued due to the [company's] employees at the end of each financial year, it was "a matter of correct accountancy practice in England to make "provision in the accounts for the sums in question in the "circumstances of this case. . . . We further found that the "sums in question being, according to Peruvian law, deferred "remuneration, there is nothing in rule 3 of the General Rules "applicable to Cases I and II of Schedule D, Income Tax Act, "1918, to prohibit the deduction of the sums in question in "computing the profits and gains of the [company] for the "purposes of income tax under Case I of Schedule D. . . . We "held accordingly that the sums in question formed a proper "deduction. . . ."

John Pennycuick Q.C., *F. N. Bucher Q.C.* and *Michael Nolan* for the appellant company. The social legislation gave the company's employees a right to the compensation thereby directed in the year of taxation. Since at any time an employee could give due notice and claim compensation on its expiry, the amount of compensation which would then be due was a sum which the company was entitled to charge against the profits of the year, even though the employee had given no such notice in fact.

The authorities relied on by the Crown for its propositions are cases, not of remuneration, but of damages. No principle of law precludes a trader from making a deduction in respect of a future liability, say, for goods purchased, merely on the ground that the liability is subject to a contingency. The second principle laid down by Jenkins L.J.[1] in the Court of Appeal is wrong. Particular reliance is placed on Law No. 9436. The proper approach is stated by Earl Loreburn L.C. in *Sun Insurance Office* v. *Clark*.[2] That case is the fountain head of the principle to be applied here. See also *Gardner, Mountain & D'Ambrumenil Ltd.* v. *Inland Revenue Commissioners*.[3] The fact that the sums in question would not become payable until a future date should be taken into account (if at all) by way of discounting their face value by reference to the average time that the employees remain in the company's service. But such a discount was not suggested by the Crown as a proper method of treatment and would not normally accord with ordinary business practice.

Leaving aside the question of contingency, there is no difficulty in calculating the profits of the company by bringing in a sum each year in respect of the compensation which will eventually become payable to each of the employees who are in its employment in that year. The method adopted by the company is the only one which produces the right result. Income tax is chargeable separately in respect of the profits of each year and this deduction is made in the year in which it accrues. The company becomes liable to pay that sum as part of the price which it has to pay for its employee's services in that particular year. The liability accrues at the end of each year. As to the application of the general principle, see *Albion Rovers Football Club Ltd.* v. *Inland Revenue Commissioners*,[4] which goes no further than *Gardner, Mountain & D'Ambrumenil Ltd.* v. *Inland Revenue Commissioners*.[5] It would not be right to hold that if a trader bought goods for a large price subject to some thousand to one contingency he would not be able to deduct it. The distinction lies in the commercial weight of the contingency,

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[1] (1955) 34 A.T.C. 80, 87.

[2] [1912] A.C. 443, 454; 28 T.L.R. 303.

[3] (1947) 177 L.T. 16; [1947] 1 All E.R. 650.

[4] (1952) 33 T.C. 331.

[5] 177 L.T. 16.

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not on whether it is positive or negative. It must depend on the nature of the contingency whether, in taking it into account, one is making a guess or saying with reasonable certainty what the liability is: see *Isaac Holden & Sons Ltd.* v. *Inland Revenue Commissioners* [6]; *Newcastle Breweries Ltd.* v. *Inland Revenue Commissioners* [7]; *Harrison* v. *John Cronk & Sons Ltd.*[8] and *Absalom* v. *Talbot.*[9]

In deciding what contingencies should be taken into account one must consider whether they are liabilities which will in all human probability mature. One can put a value on something which is subject to a contingency. One must ask whether it is reasonably capable of approximate estimation. If so, it should be brought into the current accounts at the value so estimated.

This company is therefore entitled to make a deduction each year in respect of its prospective lump sum liabilities, since they can be satisfactorily assessed. It can charge against each year's receipts the cost of making provision for the retirement payments which will ultimately accrue by reason of the fact that it has had the benefit of the employees' services during that year.

As to discounting, even if this should be allowed for, it is easy to evaluate such factors as the age of each employee and the average age at retirement or death as ascertained from past experience and to adjust the discount accordingly. If the House considers that this should have been done, the case should be remitted to the Special Commissioners to find a satisfactory method of provision.

Sir Reginald Manningham-Buller Q.C., A.-G., C. Montgomery White Q.C. and *Sir Reginald Hills* for the Crown. It is not disputed that a trader, computing his taxable profits for a particular year, may properly deduct, not only immediate payments made to his employees, but also the present value of any payments in respect of their services in that year to be made in a subsequent year, if it can be satisfactorily estimated. But that proposition does not apply to the present case, since the company is not in any year under a definite obligation to pay its employees lump sums on the termination of their employment; in each case the right to a lump sum is contingent on certain conditions being fulfilled, and so the prospective liability remains contingent until the service is actually ended. Further, the lump

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[6] (1924) 12 T.C. 768.

[7] (1927) 96 L.J.K.B. 735; 43 T.L.R. 476.

[8] [1937] A.C. 185; 53 T.L.R. 154; [1936] 3 All E.R. 747.

[9] [1944] A.C. 204; 60 T.L.R. 434; [1944] 1 All E.R. 642.

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sum cannot be regarded as earned in or payable in respect of a particular year of service. The whole sum should be debited in the accounts of the last year of service. If the company's contentions were right, a revolutionary change in the law would be effected. They were rejected by all three judges in the Court of Appeal. The legal rights of the parties are not concluded by the practice which the company has hitherto followed.

The dispute is in substance as to the effect of the law of Peru in creating rights and liabilities in relation to the company. The company is under no liability until the actual dismissal or retirement of an employee. It is inaccurate to speak of a liability accruing at the end of each year. The liability is prospective or contingent until the employee is dismissed or retires.

The question is whether one can refer back to preceding years and treat as a debit in them sums which in the future the company may or may not be required to pay. The payments in question are retirement benefits. If a company decided to introduce a pensions scheme it might make the same calculations as are here suggested and it might be sound commercial policy for it to make provision for the pensions which it would ultimately have to pay, but it would not be able to deduct for income tax purposes any sum in respect of those pensions until they were actually paid. It could deduct the amount of the pension only when the liability arose: see *Inland Revenue* v. *Western Steamship Co. Ltd.*[10] *Johnson* v. *Try Ltd.*[11] shows that one cannot bring into account as a debit an amount not expended before the liability to expend it has arisen. The deductions here claimed are not similar to those in *Vallambrosa Rubber Co. Ltd.* v. *Farmer.*[12] Reliance is placed on *Peter Merchant Ltd.* v. *Stedeford*[13]; *James Spencer & Co.* v. *Inland Revenue Commissioners*[14]; *Edward Collins & Sons Ltd.* v. *Inland Revenue Commissioners*[15]; *Whimster & Co.* v. *Inland Revenue Commissioners*[16]; *H. Ford & Co. Ltd.* v. *Inland Revenue Commissioners,*[17] and *Naval Colliery Co. (1897) Ltd.* v. *Inland Revenue Commissioners.*[18] In *Albion Rovers Football Club Ltd.* v. *Inland Revenue Commissioners*[19] the speeches are in line with the cases cited; see in particular Lord Reid. The real line of distinction lies in the question whether or not a right has come into existence.

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[10] 1907 S.C. 1005.

[11] (1946) 174 L.T. 399; 62 T.L.R. 355; [1946] 1 All E.R. 532.

[12] 1910 S.C. 519; 5 T.C. 529.

[13] (1948) 30 T.C. 496.

[14] 1950 S.C. 345; 32 T.C. 111.

[15] 1925 S.C. 151; 12 T.C. 773.

[16] 1926 S.C. 20; 12 T.C. 813.

[17] (1926) 12 T.C. 997.

[18] (1926–7) 12 T.C. 1017, 1027; (H.L.) (1928) 138 L.T. 593, 595–596.

[19] (1952) 33 T.C. 331, 342.

It should be noted that in the present case the right which arises on retirement depends primarily on the salary which the employee is receiving at the date of retirement or dismissal.

As to *Harrison* v. *John Cronk & Sons Ltd.*,[20] there was there no question of a contingent liability; it was a question of quantum: see *Gardner, Mountain & D'Ambrumenil Ltd.* v. *Inland Revenue Commissioners.*[21]

Insurance is a special case and is in a different position. It has always been treated, having regard to its nature, as being in a category of its own.

One cannot say here that there is in each year a liability accruing or presently payable. There is no such liability at the end of each year. There is no obligation of any kind until the employment is terminated—no liability during the currency of the employment.

In summary, there is a rule of law which forbids the introduction into the accounts of a given year of any provision for future payments in or out if the right to receive them or the liability to make them is at the closing of the year in law contingent.

As to discounting, this case was fought throughout on the question whether the deductions were rightly or wrongly made. It should not be sent back to the commissioners on the point of discounting.

C. Montgomery White Q.C. following. *Minister of National Revenue* v. *Anaconda American Brass Ltd.*[22] shows the difference between accounting methods for company purposes and for income tax purposes. In that case *Patrick* v. *Broadstone Mills Ltd.*[23] was approved.

John Pennycuick Q.C. in reply. The compensation should be spread over the years during which the trader has been enjoying the services of the servant. The compensation relates to all the years of his employment. It is right for the employer to make an annual provision for the lump sum.

There is no real dispute as to the relevant provisions of Peruvian legislation or their effect. The company is under a present liability to make a payment in the future, subject to certain negative contingencies. At any given moment of time the company is liable to pay compensation in the future without requiring any future services. To ascertain its true profit in any year the company must ascertain the liability for compensation which accrued during that year. The House must find the right way of ascertaining those profits. There is no overriding principle of law that contingent liabilities must be disregarded.

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[20] [1937] A.C. 185.

[21] 177 L.T. 16.

[22] [1956] A.C. 85, 95, 98; [1956] 1 All E.R. 20.

[23] [1954] 1 W.L.R. 158; [1954] 1 All E.R. 163.

The question arises at what figure the value of the liability should be ascertained. It should be valued by reference to the elements of deferment and contingency. In the Oxford English Dictionary "valuation" is defined as "The action of valuing; "the process of assessing or fixing the value of a thing" and "estimated value; worth or price as determined by deliberate "estimate." The amount of compensation which accrues in each year is relatively a very large sum, and the amount by which the company would be absolved from liability by the operation of the contingencies would be trifling, since very few members of its labour force would leave its service in such a way as to deprive themselves of the compensation. There is here no question of the company escaping tax. The only question is when and how the liability is to be dealt with.

If there should have been a discounting, the matter should go back to the commissioners.

Their Lordships took time for consideration.

June 21. EARL JOWITT. My Lords, I have had the advantage of reading the opinion which is about to be delivered by my noble and learned friend, Lord Radcliffe, with which I agree, and have nothing to add.

LORD OAKSEY. My Lords, I agree that this appeal should be dismissed.

Mr. Pennycuick, in his able argument for the appellants, contended that the social legislation of Peru conferred upon the appellants' employees a right to the compensation therein referred to in the year of taxation, and that, as an employee could at any time give the requisite period of notice and claim the compensation at the expiration of that period, the amount of compensation which would then be due was a sum which the appellants were entitled to charge against the profits of the year although, in fact, the employee had given no such notice during the year. In my opinion, the fallacy of this argument lies in the fact that the employees whose compensation the appellants sought to charge against their profits had not, as a matter of fact, given their notices or terminated their contracts, and it is clear, and not disputed, that no compensation was payable to them until their service was duly terminated.

The Peruvian legislation contains certain provisions which entitle the appellants to dismiss their employees for misconduct, and it is clear that until the contract of service is duly completed no liability to pay the compensation arises.

Reliance was placed, during the argument, upon the *Sun Insurance Office* v. *Clark*,[1] in which this House held that a percentage of the premium income of an insurance company might be deferred as a receipt to a future year because it was paid as consideration for future liability, but the principle of that decision is not, in my opinion, applicable to the present case. The premium income was only deferred and would suffer tax in a future year, whereas in the present case if the appellants are permitted to deduct compensation which they have not paid and which they may never have to pay that compensation will escape tax altogether. There is, in my opinion, a fundamental distinction between a contingent liability and a payment dependent upon a contingency. When a debt is not paid at the time it is incurred its payment is, of course, contingent upon the solvency of the debtor but the liability is not contingent. Similarly, the liability in the *Sun Insurance* case[1] was not, in my opinion, contingent but remained in force throughout the period of the insurance, though payment in pursuance of that liability might or might not have to be made.

The circumstances in the present case may put an end to the liability altogether, but in the case of insurance for a period the circumstance of loss does not put an end to the liability but merely makes payment obligatory in pursuance of the liability.

After all, the only question in the present case is whether the compensation should be deducted when it is in fact paid or should be deducted before it is paid and in circumstances in which it may never be paid. In my opinion, the reasoning and the judgments in the Court of Appeal are correct and should be affirmed.

LORD MACDERMOTT. My Lords, in this appeal the appellant claims that, in the computation of its profits for each of the years of assessment under review, an allowance should be made in respect of its liability to pay to the employees then in its service in Peru certain lump sums which, under Peruvian legislation, those employees will be entitled to receive from the appellant on the due completion of their service. The appeal is therefore concerned with payments to be made after—and it may be long after—each of the relevant accounting periods has ended. No question arises as to the deduction of wages and salaries currently paid for services rendered. What the appellant contends is, in effect, that the total cost of those services each year included, in addition to current wages and salaries, a provision to meet the amount by which the services rendered that year have enhanced the lump sums that will eventually be payable under the Peruvian legislation. In short, the appellant maintains that its employees earn each year a deferred as well as a present remuneration and that the former, no less than the latter, must be taken into account if the true yearly profits are to be ascertained for the purposes of taxation.

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[1] [1912] A.C. 443; 28 T.L.R. 303.

My Lords, as a general proposition it is, I think, right to say that, in computing his taxable profits for a particular year, a trader, who is under a definite obligation to pay his employees *for their services in that year* an immediate payment and also a future payment in some subsequent year, may properly deduct, not only the immediate payment, but the present value of the future payment, provided such present value can be satisfactorily determined or fairly estimated. Apart from special circumstances, such a procedure, if practicable, is justified because it brings the true costs of trading in the particular year into account for that year and thus promotes the ascertainment of the " annual profits " or gains arising or accruing from " the trade. As I read the judgments, the substance of this proposition was accepted in the Court of Appeal; and before your Lordships the Crown, without making any formal concession, was not concerned to argue strenuously against it. The Crown's contention—and the view taken in the courts below—was rather to the effect that the proposition did not apply to the appellant's case because (1) the appellant was not under a definite obligation in any relevant year to pay its employees lump sums at the end of their engagements since, in each individual instance, the right to receive a lump sum depended upon the fulfilment of certain conditions that made the appellant's prospective liability contingent until the service was duly terminated; and (2) it was impossible, in the circumstances, to regard any part of the lump sums as earned in or payable in respect of any particular year of service.

The first of these arguments necessitates a reference to the effect of the relevant Peruvian legislation. This was summarized in the Court of Appeal by Jenkins L.J. in two paragraphs which were accepted by both parties and which read as follows[2]: "(1) "'In the event of' that is 'upon' the determination of any "service contract between the company and any employee, "whether from the employee's death, expiry of the term, or "notice of determination given on either side, the company is "liable to pay compensation calculated as later appears to the "employee or his representatives. (2) The above general proposition is subject to exceptions (a) in the case of fixed term "contracts, where the contract has been determined by the "employee before expiry of the term otherwise than on account "of infringement by the company; and (b) in the case (apparently) "of all contracts of service, where there has been wrongful conduct of certain kinds by the employee, for example, dishonesty "or insubordination." The position, therefore, was that the appellant's liability to pay a lump sum could only be avoided by some breach of contract or grave misconduct on the part of the employee concerned. It may be correct to call such a liability contingent, but I must say the contingency seems to me too remote to justify a prudent trader or, for that matter, a competent accountant, in ignoring the liability until the day for payment has arrived. Whether, if this appeal related to but one employee and one lump sum, the degree of the contingency would, nevertheless, be such as to preclude a present allowance in respect of the future liability is a question which, in my opinion, does not call for decision on the facts of this case. I do not forget that the Court of Appeal looked at this contingency argument from the point of view of the individual employee and may, therefore, be taken as of a different opinion. With respect, however, I think that that was the wrong approach or, perhaps more accurately, that it should have been taken a stage further. The question, as I see it, on this branch of the case, was not whether, in a given year, the appellant's liability to pay this employee or that was contingent; it was whether the appellant's liability to make some payment in respect of the lump sums accruing for the benefit of all its employees in that year was in any relevant sense contingent. If that is the right view, I think the Crown's contention on this point must fail. It is clear from the accounts that the appellant's employees during the material years were numerous and the chances of all, or even a substantial proportion of them, acting so as to forfeit their lump sum rights seem to me to be much too distant and improbable to merit significance. Here the case bears a close resemblance to the state of affairs with which this House had to deal in *Sun Insurance Office* v. *Clark.*[3] There the taxpayer, a fire insurance company, was held entitled, in determining its taxable profits, to deduct from its premium income for the year an allowance for unexpired risks on policies outstanding at the end of the year. Forty per cent. of the premium income was accepted as a fair and reasonable estimate of such risks and the deduction was allowed as a proper method of ascertaining the true gains for the year in which the premiums were paid. Liability on each outstanding policy was, of course, highly contingent. But that there would be a loss on the collective risk was a matter of commercial certainty. On the facts, the situation in this appeal appears to me to be essentially the same. However one may describe the appellant's liability as respects the lump sum which may become payable to a single employee, its liability to make some payment at a future date on foot of the body of presently accruing lump sum rights cannot well be regarded as contingent within the world of ordinary business affairs. Whether this future liability can be quantified for the purposes of taxation is another matter; but in the degree of its certainty it is not, in my opinion, to be distinguished in any material respect from the future liability which was taken into account in the *Sun Insurance Office* case.[3] It was said that that decision related only to insurance business and had no application to the facts of this appeal. I see no reason for confining the scope of the decision in this way. Its ratio is much wider than that, and is, in my view, applicable to cases producing the same sort of problem, whether they relate to contracts of insurance or not.

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[2] (1955) 34 A.T.C. 80, 82.

The Crown's second submission raises a very different and, as it seems to me, a more difficult issue. It turns on the true nature of the lump sum payment made to an employee at the end of his service. If the correct view were that such payment should be regarded merely as a statutory bounty, as something independent of the length or value of the services rendered except for arithmetical purposes, I should, as at present advised, find it difficult to resist the Crown's claim that it could only be allowed for in the year of payment; on this hypothesis it would be a trading expense of that year and not, I think, of any other year. It is, however, clear that such is not the nature of the payment in question. The Crown conceded that it was deferred remuneration, and that is what the Special Commissioners and the Court of Appeal have held it to be. As Jenkins L.J. put it[4]: "The "right to this compensation is regarded as part of the remuneration for the services rendered by the employee." There can, I think, be no doubt that this accords with the tenor of the Peruvian legislation. Thus, Law No. 6871, having made provision for the calculation of the lump sum in Article 1 (as modified) "at the rate of one month's salary per yearly service time" says in Article 2: "Payment, such as is referred to in the foregoing "article, from the legal viewpoint, represents a remuneration "which the employer pays for the work of his employee, whether "the latter's engagement is for an indefinite period or for a fixed "time. . . ." And Law No. 9463, speaking in the same strain, adds: "The reduction in remuneration accepted by an employee "shall not impair in any way the rights acquired for services "rendered . . . as compensation should be calculated per years "of service in accordance with the remuneration received until "the time of the reduction. Following compensation will be "calculated in accordance with the reduced remuneration."

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[3] [1912] A.C. 443.

The lump sum payment has, therefore, to be regarded as deferred remuneration in respect of the entire period of service. This at once puts an obstacle in the way of debiting the whole sum in the accounts for the last year of service, as the Crown contends should be done, since to do so would be to inflate the cost of the services rendered for that year beyond the actual figure and thus produce a corresponding error in the amount of the annual profits. This obstacle may not conclude the matter and the error it induces may have to be accepted if no better way of computing the true profits is open. But before that can be conceded a negative answer must be found to one or other of two questions. The first of these, which is that raised by the submission under consideration, comes to this: can the amount of a lump sum payment properly be regarded as made up of parcels each of which is attributable to a particular year of service? And the second question is whether, if the lump sum can be allocated in that manner, a fair estimate can be made for each year of the provision required to meet the prospective liability.

My Lords, the first of these questions would present little difficulty if each lump sum was simply the amount found by adding together a twelfth part of the remuneration actually paid in each year of service. In that event the method of computation, coupled with the circumstance that the lump sum is to be regarded as deferred remuneration, would seem to relate the payment to each year of service almost automatically. But that is not the scheme of the Peruvian legislation, the effect of which, in this connexion, is thus summarized by Jenkins L.J.[5]: "The "compensation is an amount equivalent to one month's salary or "one-twelfth of a year's salary at the rate in force at the date "of determination for every year of service, provided that the "right to compensation accrued up to any point of time is not "liable to be diminished in amount by subsequent reduction in "pay." This provision undoubtedly leads to anomalies if one is to regard each year's accretion to a lump sum as remuneration earned in that year, the possible effect of an increase of remuneration (to take what is perhaps the most glaring example) being to raise the increment for the year of increase above that of subsequent as well as previous years. It is, I think, true to say that this consideration led Upjohn J. and, in the Court of Appeal, Jenkins L.J. to hold against the appellant on this aspect of the matter. But, while I find the point far from easy, I am of opinion that the anomalies referred to have been given more than their due weight and that the true view is that the yearly increments by which a lump sum is built up ought to be reckoned for present purposes as remuneration in respect of the years in which they accrue. It must be remembered that the anomalies are the result of a statutory scheme and that the criterion of what is sensible or reasonable contractually does not arise. Moreover, if, as I think, the lump sum is to be regarded as deferred remuneration in respect of the entire service, the case for relating each incremental step to the remuneration for the year in which it occurs cannot be lightly disregarded. After all, and whatever may be said of the manner in which the increments may fluctuate in amount, the scheme is such that at the end of each year an employee can tell with certainty not only what his lump sum will be if he then retires and does not forfeit his rights, but also how much each year of previous service has added to his entitlement. And finally, the language of Law No. 9463, with its reference to "rights acquired for services rendered" in a context relating to a point during the service and not at its end, goes at any rate some way to show that the legislation regarded the lump sum as accruing throughout the service.

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[4] 34 A.T.C. 80, 82.

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[5] 34 A.T.C. 80, 83.

Lord MacDermott.

For these reasons I consider that the Crown has failed in both the submissions discussed and, accordingly, I would hold that the appellant was right in contending that in principle it was entitled to make a deduction each year in respect of its prospective lump sum liabilities, provided such deduction can be fairly estimated or otherwise satisfactorily assessed.

There remains the question which this proviso raises and which I have already posed. The difficulty here is that the deduction sought by the appellant throughout has been the aggregate of the yearly increments by which the value of the future lump sum payments has been increased. That, I think, must be wrong as, apart from any adjustment to be made on account of possible forfeitures, this deduction makes no attempt to reflect the present value of payments which may not have to be made for anything up to the span of a man's industrial life. If the position is that no fair estimate or satisfactory computation of the provision to be made as respects the appellant's prospective liabilities can be arrived at, then that is an end of the matter and the appeal must be dismissed. I am not disposed, however, to assume that that is the position or that it is beyond the power of those skilled in such matters to produce a series of acceptable deductions for the years affected by these proceedings. I express no opinion as to whether or not this can be done. I do not know. But on the whole I feel the appellant should have an opportunity of putting this question to the test. If one may judge from the terms of the case stated, it was not debated before the Special Commissioners, and it must, I think, have been obscured in the courts below by the other issues which were the subject of a vigorous controversy throughout and were decided, wrongly as I consider, against the appellant. While I appreciate that your Lordships would be reluctant to take any step likely to start this litigation on a further round of the courts, the outstanding point is now so much a matter of fact that there is, I think, but little danger of this. For my part, therefore, I would favour a remit to the Special Commissioners to ascertain whether it is practicable to arrive at satisfactory deductions and, if so, to determine what they should be.

LORD RADCLIFFE. My Lords, the appellant has been operating its railway in Peru under the obligations of a statutory scheme by virtue of which its employees, generally speaking, are entitled to receive from it a lump sum payment on retirement, death or other termination of service. In effect, entitlement does not depend on any prescribed length of service: on the other hand, an employee can forfeit his right to payment by wrongful conduct such as dishonesty or insubordination or by failure to give due notice of retirement, which in many cases is only a short one. Employees on fixed term contracts must complete their term without breach, except in the case where the company itself is in default.

In my opinion, the solution of this case does not depend on any precise analysis of the appellant's obligations under Peruvian law. In this I am at one with the Special Commissioners, who have set out in the case all that it is necessary to know on this point. It amounts, I think, to this. The payments that fall due are retirement benefits and no payment is exigible from the company until service has been terminated. The amount of benefit is arrived at by taking a prescribed proportion of the salary of the closing year and multiplying it by the number of years of service, but this calculation is subject to a not unimportant proviso to the effect that if an employee's rate of salary or wage is reduced during the course of his service the reduction "shall not impair in any way the rights acquired for services "rendered . . . , as compensation should be calculated per years "of service in accordance with the remuneration received until "the time of the reduction. Following compensation will be "calculated in accordance with the reduced remuneration" (Law No. 9463). Thus, what is paid in the year of retirement is paid in respect of the whole period of service and is indeed declared to represent a "remuneration which the employer pays for the "work of his employee" (Law No. 6871). On the other hand, it is a single sum and I do not think that it can be said that any particular part of what is paid is in law the earning of any particular year. It might be plausible to say so in the case of a salary that never varied: but such a description cannot really be made to fit the case of the salary that increases from time to time during the period of service.

Now the question is, how ought the effects of this statutory scheme to be reflected in the appellant's accounts of the annual profits arising from its trade? One way, which is certainly the simplest one, is to let the payments made fall entirely as expenses of the year of payment and ignore any question of making provision for the maturing obligation during the years of service that precede it. This is what the company seems to have done up to the year ending June 30, 1947, and it is the system which is, according to the Crown, the only one which the law of

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income tax permits. It has one considerable advantage: no element of estimate or valuation appears in the profit assessment and nothing is charged to profits except the actual cash outgoing. But, when this has been conceded, I think that there is the very serious disadvantage to be set against the cash basis that it affords a comparatively inefficient method of arriving at the true profits of any one year. The retirement benefit is not, obviously, paid to obtain the services given in the year of retirement. The incidence of retirement payments must be variable from year to year, and they may inordinately depress the profits of one year just as they may inordinately inflate the profits of another. It is true that the company carries on business from one year to another, but it is not charged on the average of its annual profits. Tax rates and allowances themselves vary and, apart from that, to charge tax on a profit unduly accelerated or unduly deferred is, in my opinion, no more respectable an achievement than to admit that the annual accounts of business do in some cases require the introduction of estimates or valuations if a true statement of profit is to be secured.

Another method is that which the appellant is seeking to establish with regard to its assessments for the four years 1947–1950. I will say at once that what it aims at (I do not say, what it achieves) appears to me to be a more accurate assessment of true annual profit than that which could be provided by the other method. When I am told, then, that its adoption is banned by some established principle of law, to which your Lordships are bound to give effect, I feel that I must inquire closely what that principle of law is and upon what understanding of accountancy practice the principle is said to be based. For the overriding principle of law is still, I believe, as it was stated by Lord Haldane in *Sun Insurance Office* v. *Clark*[6]: "It is plain that "the question of what is or is not profit or gain must primarily be "one of fact, and of fact to be ascertained by the tests applied "in ordinary business. Questions of law can only arise when (as "was not the case here) some express statutory direction applies "and excludes ordinary commercial practice, or where, by reason "of its being impracticable to ascertain the facts sufficiently, "some presumption has to be invoked to fill the gap." And our task is not made any easier by the knowledge that, though the law with its system of precedents may sometimes seem to stand still (I hope that it does not), it is quite certain that the techniques and practices of commercial accountancy are very far from static.

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[6] [1912] A.C. 443, 455.

What the appellant claims the right to do is to charge against each year's receipts the cost of making provision for the retirement payments that will ultimately be thrown upon it by virtue of the fact that it has had the benefit of its employees' services during that year. As a corollary it will not make any charge to cover the actual payments made in the year in respect of retirement benefits. Only by such a method, it is said, can it bring against the receipts of the year the true cost of the services that it has used to earn those receipts. Generally speaking, this must, I think, be true. For, whereas it is possible that any one of its many employees may forfeit his benefit and so never require a payment, the substantial facts of the situation are that when the company has paid every salary and wage that is due for current remuneration of the year it has not by any means wholly discharged itself of the pecuniary burden which falls upon it in respect of the year's employment. This is a long-term application of the practice by which provision for holidays with pay in the coming year is charged in part against the receipts of the previous year. It does not seem to me inconsistent with the theory on which the claim is based that in the year when an increase of salary takes place and the expectation of a larger ultimate payment materializes an adjustment has to be made to take care of what has thus become the under-provision of earlier years. I agree that it is arbitrary to describe such an adjustment as accruing in respect of that year's service; but, on the other hand, it is a provision which is required in that year to take account of the increased burden which the year's salary for the year's service has thrown upon the employer.

Of course, the company's claim must be understood in the light of the fact that it is an employer dealing with the cost of services rendered to it, by which it itself has received moneys, say fares and freights, which enter into the current year's receipts. Generally speaking, I suppose, its takings are cash or short-term credits. The considerations which apply to this situation are not necessarily valid in other fields of income or expenditure. But in this field I agree that provision for retirement payments is more likely to give an accurate reflection of the true cost of earning the year's receipts than merely charging against them the year's payments to employees who retire in the year.

The courts have not found it impossible hitherto to make considerable adjustments in the actual fall of receipts or payments in order to arrive at a truer statement of the profits of successive years. After all, that is why income and expenditure accounting is preferred to cash accounting for this purpose. As I understand the matter, the principle that justified the attribution of something that was in fact received in one year to the profits of an earlier year, as in such cases as *Isaac Holden & Sons Ltd.* v. *Inland Revenue Commissioners*[7] and *Newcastle Breweries Ltd.* v. *Inland Revenue Commissioners*,[8] was just this, that the payment had been earned by services given in the earlier year and therefore a true statement of profit required that the year which had borne the burden of the cost should have appropriated to it the benefit of the receipt. The principle is clearly stated in the speech of Lord Simon in *Gardner, Mountain & D'Ambrumenil Ltd.* v. *Inland Revenue Commissioners*,[9] and I take leave to quote his words: "In calculating the taxable profit of a business "on income tax principles . . . services completely rendered or "goods supplied, which are not to be paid for till a subsequent "year, cannot, generally speaking, be dealt with by treating the "taxpayer's outlay as pure loss in the year in which it was "incurred and bringing in the remuneration as pure profit in the "subsequent year in which it is paid, or is due to be paid. In "making an assessment to income tax under Schedule D, the "net result of the transaction, setting expense on the one side "and a figure for remuneration on the other side, ought to appear "(as it would appear in a proper system of accountancy) in the "same year's profit and loss account, and that year will be the "year when the service was rendered or the goods delivered. . . . "This may involve, in some instances, an estimate of what the "future remuneration will amount to (and in theory, though not "usually in practice, a discounting of the amount to be paid in "the future). . . . If the accounts . . . were made up before "the amount of the commission was ascertained, a provisional "estimate of what the amount would be might be inserted in the "first place, and could be corrected, when the precise figure was "known, by additional assessment or by a return of any excess "within six years of the original assessment."

Lord Simon's principle is not stated in terms which fully cover the present case. For he speaks of "services completely

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[7] (1924) 12 T.C. 768.

[8] (1927) 96 L.J.K.B. 735; 43 T.L.R. 476.

[9] 177 L.T. 16, 19; [1947] 1 All E.R. 650.

"rendered." Moreover, the decisions I have mentioned were all cases of receipts the precise amount of which had been ascertained, though after the end of the year to which they properly belonged. No doubt it is much easier to get a satisfactory method for dealing with such cases. In the present case the analogue would be to wait until each retiring payment was made and then to write it back in appropriate proportions over the years covering the whole period of service. But such a method, even if ideal, is not practical politics and we can, I think, put it out of our minds. There seems, therefore, to be no alternative between letting each payment fall upon the year in which it is made or adopting some scheme of current provision such as the appellant contends for. It is clear, at any rate, from what I have quoted above that there is nothing improper in admitting valuations or estimates if by so doing a truer balance is arrived at between the receipts of a year and the cost of earning them or the expenses of a year and the fruits of incurring them. Such estimates were in fact directed by the Court of Appeal and by this House in *Harrison* v. *John Cronk & Sons Ltd.*,[10] and again by this House in *Absalom* v. *Talbot.*[11] See, too, the judgment of Lord Greene M.R. in *Johnson* v. *Try Ltd.*[12] The decision in the last-mentioned case is, I think, of value in illustrating the point that, however desirable it may be to bring in a valuation or estimate in order to give a better balance to a year's accounts, it cannot be right to do so if the figure which is to be inserted, "hedged round ". . . with every kind of contingency and speculation," is too uncertain to be fairly treated as a receipt. What is true of receipts is true of liabilities. In my opinion, it is that point which constitutes the real difficulty of the present case.

But there is no difficulty if we accept the main argument of the Crown. That argument is that, quite simply, there is a rule of law which forbids the introduction of any provision for future payments in or payments out, if the right to receive them or the liability to make them is in legal terms contingent at the closing of the relevant year. The rule, it seems, is absolute and must be adhered to whatever the current principles or practices of commercial accountancy may require as a method of ascertaining the year's profits. And this is the argument which hitherto has prevailed in the High Court and the Court of Appeal. Now, in my opinion, there is no such rule of law governing the ascertainment of annual profits. Where does it come from? Not from anything to be found in the Income Tax Acts, which, indeed, by the well-known rule limiting the exclusion of debts, show a different and, as I think, a more realistic approach to the problem. Not from any decided authority which is binding on your Lordships. On the contrary, there are two decisions of this House which negative the existence of any such rule of law. In *Sun Insurance Office* v. *Clark*[13] the House had to deal with the ascertainment of the profits of a fire insurance business which had two special features: it was growing, and the practice was in some cases to take premiums covering a longer risk than one year. The gross receipts inevitably included payments received in respect of unexpired policies, of each of which it could truly be said that any liability under it was contingent on the future maturing of the risk. No fire, nothing to pay. Yet the decision of the House recognized that it was correct for the insurance company to ascertain its profits for each year by carrying forward a fixed percentage of the gross premium income of the year as a provision against unexpired risk. No doubt the carry-forward was treated as a receipt of the succeeding year and that year charged again with a new provision in respect of its new premiums. But the point is that the profit of each year was held to be correctly ascertained despite the inclusion of a provision for contingent liabilities. No doubt too this was insurance business. But insurance business does not live in a world of its own in income tax law. What it does is to throw up in an accentuated form some of the problems that affect, though perhaps in less degree, the ascertainment of the true profit of many other businesses. And in some cases special rules have to be evolved to deal with them.

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[10] (1935) 153 L.T. 366 (C.A.); [1937] A.C. 185; 53 T.L.R. 154; [1936] 3 All E.R. 747.

[11] [1944] A.C. 204; 60 T.L.R. 434; [1944] 1 All E.R. 642.

[12] 174 L.T. 399, 404; 62 T.L.R. 355; [1946] 1 All E.R. 532.

The other decision is *Harrison* v. *John Cronk & Sons Ltd.*[14] The trader in that case had acquired by his trading a contingent right to receive certain moneys deposited with a building society. It would be impossible to say of any one of these deposits in the year in which it was made that it represented a certain right for the trader to be paid any part of it in the future, for by the terms of the arrangement with the house purchaser default on his part might involve forfeiture or reduction of the trader's deposit. It was not money in the trader's hand, and, moreover, it might never be. Yet this House upheld the order of the Court of Appeal that the contingent rights ought to be brought in as receipts of the year in which they arose, though at a valuation (if feasible), not at their face value.

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[13] [1912] A.C. 443.

[14] [1937] A.C. 185.

I am satisfied by these decisions that there is no such rule of law as is suggested. The answer to the question what can or cannot be admitted into the annual account is not provided by any exact analysis of the legal form of the relevant obligation. In this case, as in the *Sun Insurance* case,[15] you get into a world of unreality if you try to solve your problem in that way, because, where you are dealing with a number of similar obligations that arise from trading, although it may be true to say of each separate one that it may never mature, it is the sum of the obligations that matters to the trader, and experience may show that, while each remains uncertain, the aggregate can be fixed with some precision. For the trader the practical question is always the same in these cases: How much more shall I have to pay out or shall I be able to get in than my current accounts of the year are recording? Legal analysis of the obligation may present it in a variety of different forms. There is the deferred payment which is subject to nothing more than the practical contingency that it may not be received. That is dealt with, as we know, by bringing it in at its face value, subject to allowance, or, in some cases, at a valuation. There is the future payment for work done which is only legally exigible if the whole work is completed. A large part of this particular aspect must be covered by such items of receipt as work in progress, but I do not know enough of the methods of valuing or allowing for this to speak with any confidence about it. And, lastly, there is the contingent obligation to make a future payment, which is our present case. But, whatever the legal analysis, I think that for liabilities as for debts their proper treatment in annual statements of profit depends not upon the legal form but upon the trader's answers to two separate questions. The first is: Have I adequately stated my profits for the year if I do not include some figure in respect of these obligations? The second is: Do the circumstances of the case, which include the techniques of established accounting practice, make it possible to supply a figure reliable enough for the purpose? The authorities, *H. Ford & Co. Ltd.* v. *Inland Revenue Commissioners*,[16] *Peter Merchant Ltd.* v. *Stedeford*,[17] *James Spencer & Co.* v. *Inland Revenue Commissioners*,[18] are, no doubt, very relevant in answering the second question, as must be the mere fact that an obligation is in its own terms contingent; but I regard them rather as illustrations of the kind of answer that should be given than as laying down any general principle or rule of law.

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[15] [1912] A.C. 443.
[16] (1926) 12 T.C. 997.
[17] (1948) 30 T.C. 496.
[18] 1950 S.C. 345; 32 T.C. 111.

Nor can I see what useful instruction is to be obtained from Lord Clyde's judgment in *Whimster & Co.* v. *Inland Revenue Commissioners.*[19] First, the learned judge's formulation of some general rules according to which annual profits should be determined for purposes of income tax is explicitly based on his understanding of what he calls "the ordinary principles of commercial accounting."[20] Secondly, his observation, no doubt correct, that annual profits properly determined are not to be treated as reduced by the circumstance that some part of them may be prudently reserved from distribution by the owner of the business to take care of an apprehended loss from future trading, offers no solution to the problem of the present case, in which the accountants who have given evidence would say, I suppose, that they were not advocating the making of a reserve, but seeking to evaluate a current cost of working.

This brings me at last to the facts of the present case. I am bound to say that, but for what has been found by the Special Commissioners, I should have thought that the charges for retirement benefits which the appellant has claimed to make in the four relevant years were well on the wrong side of what was permissible. When account is taken of all the circumstances, I should have thought that the sums charged were a very long way from affording a scientific appraisement of the additional burden arising in respect of the year's services; and were, therefore, in the nature of a rough reserve against the future rather than a measured provision. Because what the appellant has done is simply this. It has calculated what sum would be required to be paid to each employee in respect of retirement benefit if he retired, without forfeiture, at the close of the year: and the aggregate of what is required is set aside in so far as the year has contributed to the aggregate. I think that that is a sufficiently accurate description of the process as it was explained to us. But it seems to me to leave out of account several factors that are essential to the appraisement.

First, there is the contingency itself that any one benefit may in the end be forfeited. This seems to me the least important of the factors, since it is extremely probable that most will be paid; and on the fact found that the appellant had never yet failed to pay retirement benefit to an employee on any ground, I think

[19] 1926 S.C. 20; 12 T.C. 813.

[20] 1926 S.C. 20, 25; 12 T.C. 813, 823.

that the weight of the contingency is in effect nothing. But, secondly, it must not be forgotten that these benefits and their scale are imposed by legislation, not by voluntary contract: and one cannot exclude the possibility that both the form and the scale of what has to be paid may be altered again without the company's consent. Thirdly, there is the very important factor of discount. To reserve each year's increment at face value, as the appellant does, presents itself to me as making a serious over-provision. It is true that trade debts on short-term credit are not brought in at a discount; but here we are dealing with liabilities which cover a whole period of service and of which some may be deferred 30 or 40 years before payment. No doubt each is at call at the close of the year, in the sense that any employee may retire and claim his accrued benefits on notice. But the point is that most of the staff would not be doing that: and to provide each year's increment at face value on the ground that it is in that sense presently payable seems to me to be falling into the same error of confusing the individual legal form with the substance of the whole, which I find amiss with the arguments for the Crown.

In my opinion, therefore, the appellant must be wrong in omitting to allow for discounting. So much, indeed, was conceded by its counsel in the course of argument. But then, it was said, that would be quite easy to do. I can see that it would be easy if the age of each workman and employee were known, the retirement age were fixed and each of them were to remain in service until that age. But then some will die and some will leave service before retiring age and these factors accelerate payment and so pro tanto increase the present value of each prospective payment. Well, it is said, given sufficient information, it will be possible to evaluate these factors by averages based on past experience and make adjustments of the discount accordingly. Perhaps it would, but the case stated gives us no information at all on the matter. And the averages themselves may be falsified by events, so leading either to over-provision or under-provision for the risks. If one is really going to formulate a water-tight scheme of providing for such a difficult problem, I should expect to find that it included an arrangement for periodical revision of the aggregate of the outstanding appropriations in the light of the current risks, so that anything over-provided could be brought back into taxation.

Bearing these considerations in mind, I find it impossible to give any conclusive weight to the finding of the Special

Commissioners that the appellant's method of face value appropriations ought to be upheld, because "it was a matter of correct "accountancy practice in England to make provision in the "accounts for the sums in question in the circumstances of this "case." I wish that I could, because I should view with dismay the assertion of legal theories as to the ascertainment of true annual profits which were in conflict with current accountancy practice and were not required by some special statutory provision of the Income Tax Acts. And it is apparent that in this case the Special Commissioners' finding was arrived at after hearing the evidence of the company's auditor and another independent accountant of distinction. The auditor said, as auditors have said before in other cases, that he "would not "have signed the balance sheet without a qualification, unless "the afore-mentioned provision had been made."

All this is very important, because, of course, accountants are very specially concerned with the problems that attend the true ascertainment of a year's profit and the establishment of techniques that assist in this. But, for all that, there is nothing in the case that seems to me to fix on the point that is really the heart of this appeal. The requirements that an auditor may make before signing a balance sheet (I assume that the words used in the case are meant to cover the statutory reference to the profit and loss account) do, no doubt, cover his opinion that that account gives a "true and fair view" of the profit for the financial year, but I do not think that such requirements are necessarily the same thing as the auditor's opinion that some particular provision could not be omitted without compromising the true and fair view. It is not possible completely to equate the balance shown by a company's profit and loss account with the balance of profit arising from the trade for the year. The word "provision" is becoming a technical one in contradistinction to the word "reserve" owing to the definitions of the two terms supplied by the Companies Act, 1948, Schedule VIII, Part IV, paragraph 27: but the word "provision" includes any amount written off or retained "for any known liability of which "the amount cannot be determined with substantial accuracy," and I think that one is bound to say that references to an auditor's duty under the Companies Act take us into a field that is not exactly the same as that in which the annual profits of trade should be ascertained for the purposes of income tax. There is nothing in the evidence or the Special Commissioners' finding which supplies an answer to what I regard as the vital

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SOUTHERN RAILWAY OF PERU LTD.
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Lord Radcliffe.

question relevant to these cases—is the sum provided an essential charge against the receipts of the trade in order to enable a true profit from that source to be stated for the year in question? And, as I see it, such a question cannot be answered just by one man's opinion. It is important to know how far it is supported by accepted theory or established practice. In the absence of any light on all these points, I think that your Lordships are bound to use your own judgment, supported, indeed, as it is, by the admissions made by the appellant's counsel during the course of the hearing and by the fact that an alternative, albeit a rough and ready, method is available which has, after all, been adopted in the past.

My Lords, I feel bound to come to the conclusion that the appeal fails. I do not think that this is an occasion upon which the case should be remitted to the Special Commissioners to see whether a new and more satisfactory method of provision could be extracted from evidence. The appellant has stood throughout on its claim that the provisions that were claimed before the Special Commissioners were those that it was entitled to make, though I gather that during the course of the various appeals it was admitted that it might be proper to discount. To send the case back, when it is not even certain that a proper method can be found, is really to start it all over again and would apparently involve the hearing of further evidence. That is to go beyond the function of a final appeal.

LORD TUCKER. My Lords, I have had the advantage of reading in print the opinion of my noble and learned friend, Lord Radcliffe, which has just been delivered. I agree with him that there is no such absolute rule of law governing the ascertainment of annual profits as was contended for by the Crown in the present case, and that there is no ground for holding that the decision of this House in *Sun Insurance Office* v. *Clark* [21] must be confined exclusively to insurance companies. I also agree, for the reasons which he has given, that the finding of the Special Commissioners that the appellant's method of accounting is in accordance with " correct accountancy practice " cannot, in the circumstances of this case, be regarded as conclusive.

I would accordingly dismiss the appeal.

Appeal dismissed.

Solicitors: *Smiles & Co.; Solicitor of Inland Revenue.*

[21] [1912] A.C. 443.

[HOUSE OF LORDS.]

H. L. (E.)* LONDON COUNTY COUNCIL . . . APPELLANTS;

AND

WILKINS (VALUATION OFFICER) . . RESPONDENT.

1956
May 9, 10;
July 11.

Rates and Rating—Rateable occupation—Building contractor's huts—Site handed over to contractors—Huts not affixed to ground—Whether rateably occupied.
Chattel—Fixture.

Building contractors, having entered into a contract with a county council to build a school on a site owned by the council, the site was handed over to them and they erected thereon, for the purpose of carrying out the contract, various temporary structures used for offices, stores and a canteen. Three were sectional wooden huts, two were of corrugated iron and, although only one was in fact moved to a different part of the site, any might have been moved. They remained on the site for 18 months and were then dismantled. It was proposed to add them to the valuation list as rateable hereditaments. The Lands Tribunal held that they were rateable hereditaments:—

Held, that the tribunal had made its decision on the facts and had not misdirected itself in law and, accordingly, its decision should not be reversed. The question whether or not the structures had lost their chattel character was not decisive as a test of rateability, nor was the conscious intention of the contractors to attach or not to attach them to the soil. These were no more than factors which must be considered and it did not appear that the tribunal had ignored them. The test of rateability was whether there was evidence that the structures, occupied for a period which was not transient, were enjoyed with the land and enhanced its value.

Westminster Council v. *Southern Railway Co.* [1936] A.C. 511; 52 T.L.R. 541; [1936] 2 All E.R. 322; *John Laing & Son Ltd.* v. *Kingswood Assessment Committee* [1949] 1 K.B. 344; 65 T.L.R. 80; [1949] 1 All E.R. 224, and *Glasgow Assessor* v. *Gilmartin*, 1920 S.C. 488 applied.

Decision of the Court of Appeal [1955] 2 Q.B. 653; [1955] 2 All E.R. 180 affirmed.

APPEAL from the Court of Appeal (Evershed M.R., Jenkins and Romer L.JJ.).

This was an appeal from an order of the Court of Appeal dated March 30, 1955, whereby an appeal by the London County Council, the appellants, on a case stated by the Lands Tribunal

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* *Present*: VISCOUNT KILMUIR L.C., EARL JOWITT, LORD OAKSEY, LORD RADCLIFFE and LORD TUCKER.

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LONDON COUNTY COUNCIL *v.* WILKINS (VALUATION OFFICER).

(Sir William Fitzgerald, Q.C., and Mr. C. H. Bailey, F.R.I.C.S., M.INST.C.E.), pursuant to section 3 (4) and (11) of the Lands Tribunal Act, 1949, and R.S.C., Ord. 58B, was dismissed and the decision of the tribunal was affirmed. The tribunal by its decision had dismissed (subject to an agreed minor amendment of the valuation list) an appeal by the appellants against a decision of the North-East London local valuation court that a hereditament described as "offices, stores and canteen, etc.," situate at Walker Street school site in the occupation of F. R. Hipperson & Son Ltd. (hereafter called "the contractors"), should be added to the valuation list for the Stepney Metropolitan Borough rating area at gross value £35, rateable value £24. It was agreed before the tribunal that a hut occupied by the appellants' clerk of the works should not be included in the hereditament and the values were accordingly amended to gross value £29 and rateable value £20. The respondent was Joseph Lawrence Wilkins (valuation officer).

The facts, stated by Viscount Kilmuir L.C., were as follows: The appellants were the owners of certain land situate in Walker Street in the Metropolitan Borough of Stepney. In order to build a school thereon the appellants entered into a contract with the contractors dated March 30, 1950.

The appellants handed over the building site to the contractors on December 12, 1949. In about January, 1950, the contractors brought on to the building site and erected there certain huts which were described in the case stated as follows: "A. General "Foreman's and Timekeeper's Office. Wooden sectional hut "with wood roof covered by tarred felt, wood floor on sleepers. "Dimensions, 9′ by 12′ 9″, area 114 square feet. Dismantled "early in September, 1951. If assessed separately gross value "attributable was £4. B. London County Council Clerk of "Works Office. Wooden sectional hut with wood roof covered "by tarred felt, wood floor on sleepers. Dimensions: 11′ 9″ "by 14′ 3″, area 167 square feet. Dismantled on July 16, 1951. "If assessed separately gross value attributable was £6. "C. Cement Store. Corrugated iron sides and roof with concrete "floor. Dimensions: 9′ by 14′, area 126 square feet. Dis-"mantled on June 30, 1951. If assessed separately gross value "attributable was £5. D. Canteen and Store. Wooden sec-"tional hut with wood roof covered by tarred felt, wooden floor, "standing on old roadway or playground site. Dimensions: "14′ 10″ by 30′, area 445 square feet. Dismantled on June 30, "1951. If assessed separately the gross value attributable was

"£17. E. Plumbers' Store. Corrugated iron sides and roof, "standing on old roadway or playground site. Dimensions: 8′ "by 12′, area 96 square feet. Dismantled on June 30, 1951. If "assessed separately the gross value attributable was £3. It "was agreed in this case that the London County Council clerk "of works office should not be included in the hereditament and "that in consequence the gross value should, if the huts were "held to be rateably occupied, be £29, rateable value £20. Huts "A, C, D and E will be referred to hereinafter as 'the said huts.' "The said huts were erected on the actual building site, no "particular area of which was set aside for that purpose. The "contractors chose where to erect each of the said huts on the "building site. The said huts were used for the following purposes:—A. General Foreman's and Timekeeper's Office. This "was where the general foreman kept his drawings and the timekeeper his books. One or two implements—a theodolite and "various odds and ends of builders' materials were stored here. "The office was not used for anything except work in connexion "with building the school. It was moved once during the course "of building operations from one position to another on the "building site. C. Cement Store. This was used solely for the "storage of cement. D. Canteen and Store. This contained "forms and a table; electric light was laid on; and there was a "stove fixed in the corner, with a pipe through the roof, for "heating water and for tea. There were no other cooking "facilities, and no food was provided there. E. Plumbers' Store. "This was used solely for the storage of plumbers' goods.

"The tools, builders' materials and cement referred to in the "last preceding sub-paragraph hereof were brought on to the "building site solely for the purposes of the said contract. The "said huts were locked by the contractors each night and the "keys were kept by the contractors' foreman. The clerk of "works could demand admission to the said huts at any time "but as the keys were in the possession of the contractors he "could only enter the said huts when admitted by the foreman "or other employee of the contractors."

Michael Rowe Q.C. and *G. D. Squibb Q.C.* for the appellants. The sheds were brought onto, and used on, a building site which was not rated. They were just like any other part of the builders' equipment. It is true that only one shed was moved to another part of the site, but any of the others might have been so moved according to the exigencies of the building operations. Accordingly there was no intention to create a hereditament (i.e., "any "lands, tenements, hereditaments or property which are or "may become liable to any rate": section 68 (1) of the Rating and Valuation Act, 1925). There was no de facto creation of a hereditament.

The four essential elements of rateable occupation are set out in *John Laing & Son Ltd.* v. *Kingswood Assessment Committee*,[1] actual possession, exclusive possession, possession which is of some benefit to the possessor and also which has some quality of permanence. That case was correctly decided on its facts and issues but it does not govern the present case. In that case a defined area was set aside for the erection of the contractors' offices and the like. But in the present case there was no such defined area and the contractors were given the whole of the building site to get on with the works which they had contracted to do. What Lord Goddard C.J. said in the Divisional Court[2] shows that a different argument was submitted in that case from that which is now being submitted to the House.

As to what is a chattel and how long an object remains a chattel, see *Hellawell* v. *Eastwood*[3]; *London County Council* v. *Pearce*[4]; *Glasgow Assessor* v. *Gilmartin*,[5] and *Billing* v. *Pill.*[6] When the contractors here took these huts from their ground to the site they did not make them part of the realty. They put them there as part of their equipment for fulfilling their contract. Before a hut becomes part of the realty there must be annexation for a permanent purpose, but these huts were soon going to be removed. That is strong evidence as to the intention of putting them where they were. A peripatetic hereditament is unknown to the law. Here the element of permanence was wanting.

There was never a dedication of any part of this site to the huts which are put up like scaffolding as it suits the contractors. Even if they were attached to the ground (which they are not) they would still be chattels. It is not a question of degree. The Court of Appeal and the Lands Tribunal have disregarded the essential and fundamental question of the intention of the persons who put the structures up. They applied a wrong principle and not the true test. Structures like these placed on the land in these circumstances do not cease to be chattels. There is no evidence that they have lost their chattel character. If the true test is applied, the answer must be that they are still chattels.

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[1] [1949] 1 K.B. 344, 348, 357; 65 T.L.R. 80; [1949] 1 All E.R. 224.

[2] [1948] 2 K.B. 116, 120; 64 T.L.R. 407; [1948] 1 All E.R. 943.

[3] (1851) 6 Ex. 295, 311.

[4] [1892] 2 Q.B. 109; 8 T.L.R. 531.

[5] 1920 S.C. 488.

[6] [1954] 1 Q.B. 70; [1953] 2 All E.R. 1061.

Annexation is a factor to be considered. So is time or the period of erection, as are also size, quality, amenities and purpose. One has to look at the circumstances of the case generally. As to what may be "plant," see *Yarmouth* v. *France.*[7]

It is hard to imagine that the alleged hereditament here could ever be the subject of a letting. These huts were chattels before they went onto the site and they retained their nature as chattels. Therefore they were not rateable. As to the test, see *Wansborough* v. *Maton*,[8] *per* Lord Denman C.J.

It is not fatal to the contractor's case if he was seeking to use a non-rateable structure as the economic equivalent of a rateable structure. The proper question is whether or not the contractor considered these huts attached to the soil. Even if, in some cases, the surface of the land itself constitutes a rateable hereditament, the meaning of hereditament cannot include the structure on it so long as that structure remains legally a chattel. The structures cannot be rated or even taken into account as enhancing the value of the occupation of an otherwise rateable piece of land.

G. D. Squibb Q.C. following. The appellants' contention is supported by the definition of "hereditament" in section 4 of the Valuation (Metropolis) Act, 1869, and by section 1 of the Poor Relief Act, 1601. "Lands" and "houses" must be real property. Only as such could they be rated.

Maurice Lyell Q.C. and *Patrick Browne* for the respondent. The test of rateability is whether there is evidence that the structures were enjoyed with the land and enhanced its value. The object with which the huts were put on the land is not dependent on the ratepayer's subjective intention; it depends on the purpose for which they are used. All these huts are in the nature of buildings where the contractors can do office work, give their men accommodation for feeding or keep their cement dry. When a builder brings huts onto such land as this, he does it to enhance the value of the land to himself so that he may do his work on it more commodiously and to make his occupation more beneficial. Four walls and a roof designed to enable men to live, work or keep gear is always intended to enhance the value of the land and partake of the nature of the land. That was the effect of *Westminster Corporation* v. *Southern Railway Co.*,[9] which covers this matter. Contrast *London County Council* v. *Humphreys Ltd.*,[10] where a building was not placed on land for its better enjoyment. It is admitted that there must be metes and bounds to a rateable hereditament, but the huts themselves here mark the metes and bounds.

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[7] (1887) 19 Q.B.D. 647; 4 T.L.R. 1.

[8] (1836) 4 Ad. & E. 884, 888.

[9] [1936] A.C. 511, 559–560, 566; 52 T.L.R. 541; [1936] 2 All E.R. 322.

A building site is not rateable because it is not in the beneficial occupation of the owner. But the contractors here have the exclusive occupation of these huts. The huts are buildings the purpose of which is to enhance the value of the land on which they stand.

Suppose in circumstances like those of *Westminster Corporation* v. *Southern Railway Co.*[11] the railway had offered a trader a kiosk site for a period limited to a year only, because of impending structural alterations, and the trader took the site and put up the kiosk, the fact that it would only be there for a year would not make any difference to its rateability. So, similarly, a builder in exclusive possession, for the purposes of offices and storage, of part of a building which he was erecting would be in such possession that that part would be rateable. In the present case the huts are not too transient: see *Glasgow Assessor* v. *Gilmartin.*[12] As to transience, see also *Mitchell Brothers* v. *Worksop Assessment Committee.*[13] Once one has a structure capable of being rated, time only comes in on the consideration whether it is too transitory.

As to the ascertainment of rateable value, see section 22 of the Rating and Valuation Act, 1925. As to houses and buildings, see Schedule II of the Act and section 2 of the Rating and Valuation (Apportionment) Act, 1928.

Holland v. *Hodgson* [14] was dealing with a different subject-matter from that with which this case is concerned. See also *Hobson* v. *Gorringe.*[15] There was a sufficient element of permanency here: *British Transport Commission* v. *Walker*,[16] *per* Viscount Simonds. The huts here were not plant, but the setting of the contractors' business: *Woodward* v. *Brading & Blundell Ltd.*[17] and *J. Lyons & Co. Ltd.* v. *Attorney-General* [18]

The only appeal from the Lands Tribunal is on a question of law, and unless it has come to a wrong decision in law it cannot be reversed. If the question here is one of degree the decision of the tribunal cannot be reversed. The tribunal applied the right test and there was ample evidence to support its conclusion.

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[10] [1894] 2 Q.B. 755; 10 T.L.R. 594.

[11] [1936] A.C. 511.

[12] 1920 S.C. 488.

[13] (1904) 92 L.T. 62.

[14] (1872) L.R. 7 C.P. 328.

[15] [1897] 1 Ch. 182, 191–192; 13 T.L.R. 139.

[16] (1955) 48 R. & I.T. 262, 265.

[17] (1951) 44 R. & I.T. 758, 774, 793, 796.

[18] [1944] Ch. 281; 60 T.L.R. 313; [1944] 1 All E.R. 477.

Wansborough v. *Maton* [19] was a right decision on the facts. *Billing* v. *Pill* [20] is a decision purely on the criminal law and has no relevance to present topics.

Patrick Browne following. It is not sufficient for the appellants to succeed for the huts to have a chattel character. A person may be rateable in respect of property although it is not so annexed to the freehold as to pass to the owner of the freehold: see *Cory* v. *Bristow*,[21] a case of moorings on the Thames, and *Lancashire and Cheshire Telephone Exchange Co.* v. *Manchester Overseers*,[22] a case of telephone apparatus, and also *Westminster Corporation* v. *Southern Railway Co.*,[23] the case of the railway station show cases. Chattel character is not a final test of rateability. The same considerations may not apply in rating as in other connexions when it must be considered whether an object has become part of the freehold, so that stones in the Thames and wires on posts have been held to be land for the purposes of rating.

Michael Rowe Q.C. in reply. No building site or unfinished building has ever been rated. Chattels and plant are not rateable: see Ryde on Rating, 10th ed., p. 6. See also section 1 of the Poor Rate Exemption Act, 1840. Here there was no severance of the hut sites from the rest of the building site, any more than when bricks are stacked on the site. On the facts this is in contrast with *Westminster Council* v. *Southern Railway Co.*[24] In that case the company did not raise any point as to the chattel character of the kiosks; it was assumed that either the company or the licensee was rateable. The whole area of Victoria Station was, in any event, rateable; the only question was whether the licensees should be separately rated in respect of certain parts of it or whether the whole was a railway hereditament. In *Mitchell Brothers* v. *Worksop Union Assessment Committee* [25] the sites for the huts had been carved out of the land, but that was not the case here. *Holland* v. *Hodgson* [26] and *Hobson* v. *Gorringe* [27] are relied on. There was no intention on the part of these contractors to make the huts a part of the

[19] 4 A. & E. 884.

[20] [1954] 1 Q.B. 70.

[21] (1877) 2 App.Cas. 262, 263, 271, 278, 280.

[22] (1884) 14 Q.B.D. 267, 268, 270, 271; 1 T.L.R. 111.

[23] [1936] A.C. 511, 566.

[24] [1936] A.C. 511, 513–514.

[25] 92 L.T. 62.

[26] L.R. 7 C.P. 328, 334–335, 336, 339.

[27] [1897] 1 Ch. 182, 193.

realty, even for a time. They are like a portable hen-house, which has a chattel character. They could be moved and at least one of them was moved. Everything shows that there was no true carving out or creation of a new hereditament. The site was always a building site. As to the question of degree, it is admitted that a hospital, for instance, would be rateable, although the structure was temporary and could be taken to pieces. The same would be true of sleeping huts, which would be the equivalent of a permanent building. An intention to annex may be found in such features as size, method of attachment, type of flooring, supply of water, heat and light, drainage. But these huts were merely intended to help the builder to carry out his job. Reliance is placed on *J. Lyons & Co. Ltd.* v. *Attorney-General.*[28]

Their Lordships took time for consideration.

July 11. VISCOUNT KILMUIR L.C., having stated the facts, continued: My Lords, the decision of the Lands Tribunal was that they were unable to find any distinction between this case and that of *Woodward* v. *Brading & Blundell Ltd.*[1] The decision of the Lands Tribunal in *Woodward* v. *Brading & Blundell Ltd.*[1] also related to various structures described as " builder's huts " which had been erected by builders on sites where they were carrying out work. In its decision in that case the Lands Tribunal referred to sections 21 and 68 of the Rating and Valuation Act, 1925, and to the Rating and Valuation Acts (Form of Valuation List) Rules, 1932, and continued[2]: " We think it follows that " the primary question for our decision . . . is whether the " ' builder's huts ' described are within the description of ' lands, " ' tenements, hereditaments or property which are or may " ' become liable to any rate . . .' so as to constitute a ' hereditament ' of which the prescribed particulars should be inserted " in the valuation list."

The Lands Tribunal then referred to the decision of the Divisional Court in *Mitchell Brothers* v. *Worksop Union Assessment Committee*,[3] and to the decisions of the Divisional Court and the Court of Appeal in *John Laing & Son Ltd.* v. *Kingswood Assessment Committee*,[4] quoted the definition of the " four

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[28] [1944] Ch. 281, 287.

[1] (1951) 44 R. & I.T. 758, 774, 793.

[2] Ibid. 797.

[3] (1904) 92 L.T. 62; 21 T.L.R. 156.

[4] [1948] 2 K.B. 116; 64 T.L.R. 407; [1948] 1 All E.R. 943; [1949] 1 K.B. 344; 65 T.L.R. 80; [1949] 1 All E.R. 224 (C.A.).

"factors or ingredients of rateability" submitted by counsel (Mr. Michael Rowe, Q.C.) and adopted by the Court of Appeal in the last-mentioned case as set out in the judgment of Jenkins J.[5] (as he then was), and stated its conclusions as follows[6]: "We "are satisfied, on the facts submitted, to us, not only that the "buildings which are the subjects of these appeals are of rate"able types, but that each of the ratepayers had actual posses"sion and an exclusive beneficial occupation for the purpose of "carrying out the respective contract; and, furthermore, that the "possession by the ratepayers in each of the cases had a "sufficient quality of permanence to justify the valuation officer "in making his proposal." The Lands Tribunal also rejected a contention put forward by the ratepayers[7] "that the various "buildings were 'plant,' in the sense of that word as used in "section 24 of the [Rating and Valuation Act,] 1925, so as not "to be rateable . . ."

The question stated in the present case by the Lands Tribunal for the decision of the Court of Appeal was "whether we came "to a correct decision in law, and if not, what should be done in "the premises." In their notice of motion in the Court of Appeal the appellants stated that the grounds upon which they contended that the "determination and decision of the Lands "Tribunal is erroneous in point of law are that the Lands "Tribunal was wrong in law in holding: (1) that the said here"ditament was capable of beneficial occupation; (2) that the "occupation of the said hereditament was sufficiently permanent "to give rise to rateable occupation; (3) that the said heredita"ment was rateably occupied by the contractors."

The Court of Appeal held that, apart from the question (with which the case of *John Laing & Son Ltd.* v. *Kingswood Assessment Committee*[8] did not deal) whether these huts were in the nature of chattels as distinct from being part of the hereditament consisting of the structure itself and the area of land supporting it, this case was governed by *Laing's* case.[8] They further held that the structures were not chattels standing upon the land but were structures which, while they remained on the land, were for the purposes of rating properly regarded as part of the hereditament.

Before this House the argument of counsel for the appellants had to me the perennial attraction of rugged simplicity. He submitted that these sheds were brought on to and used on a building

[5] [1949] 1 K.B. 344, 357.

[6] 44 R. & I.T. 793, 797.

[7] Ibid. 798.

[8] [1949] 1 K.B. 344.

site which was not rated, just like any other part of the builders' equipment: that, although only one shed was moved to another part of the site, any of them might have been moved according to the needs of the building operations; and that therefore there was neither the intention to create, nor the de facto creation of, a hereditament which by statutory definition means "any lands, "tenements, hereditaments or property which are or may become "liable to any rate . . ."

It must not, however, be forgotten that, by virtue of the Lands Tribunal Act, 1949, a decision of the tribunal is final; but a person aggrieved by such a decision, as being erroneous on a point of law, is entitled to require the tribunal to state a case for the decision of the Court of Appeal. It is, in my view, particularly important in these days, when juries in civil matters are seldom seen, that reserved fields of fact should be inviolate and that appellate courts should not, by the intrusion of their factual opinions, make more difficult the correct decision on particular circumstances.

Doubtless with this in mind, Mr. Rowe went on to submit, first, that there was no evidence that the structures had lost their chattel character, and, secondly, that the Lands Tribunal and the Court of Appeal had ignored an essential factor in the creation of a hereditament, namely, the intention of the person who had put structures on the site.

Junior counsel for the respondent, in an argument that was as pointed as it was brief, submitted that chattel character is not enough. He referred us to the rating of moorings in the Thames which remained the property of Messrs. Cory according to the opinions of Lord Cairns, Lord Hatherley and Lord O'Hagan in *Cory* v. *Bristow*.[9] He also drew our attention to the rating of the company's telephone apparatus in *Lancashire and Cheshire Telephone Exchange Co.* v. *Manchester Overseers*[10] and to the rating of the show cases in *Westminster Council* v. *Southern Railway Co.*[11] On these authorities Mr. Browne submitted that chattel character was not a final test of rateability. It is, however, to be noted that in these cases the chattels had qualities which made it clear that they were enjoyed by their owners with the land on which they were. The moorings, including their attachment to the bed of the river, were held to be very different from the ordinary anchor of a ship that might move from one rating area to another. The equipment of the telephone company was held to occupy so much of the soil as was necessary to support so much of the building as in turn was necessary to support its equipment (*per* Brett M.R.[12]). The show cases in the railway station, according to Lord Wright,[13] "might fairly "be regarded as shop windows." These examples are different from chattels, say bricks, simply placed—although for a considerable time—on a site which in this case is not rated even as a place of storage. The bricks on the building site, waiting to be made into a school, cannot be said to be enjoyed with the land. In my view a chattel to be rateable must be enjoyed with the land on which it rests. I do not wish to magnify what may fundamentally be merely a difference of phraseology, but I agree that, even if counsel could have satisfied me that there was no evidence that the structures had ceased to be chattels, he would still have had to face the further question whether they were enjoyed with the land on which they rested. However, it is implicit in the argument for the appellants that the structures were so obviously ancillary and subsidiary to the building operations that there was no such enjoyment.

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[9] (1877) 2 App.Cas. 262, 271, 278, 280.

[10] (1884) 14 Q.B.D. 267; 1 T.L.R. 111.

[11] [1936] A.C. 511, 566; 52 T.L.R. 541; [1936] 2 All E.R. 322.

From this aspect, Mr. Rowe pressed the importance of the intention of the contractors. Reliance was placed on a statement in the judgment of Blackburn J. in *Holland* v. *Hodgson* [14]: "... where an article is affixed by the owner of the fee, though "only affixed by bolts and screws, it is to be considered as "part of the land, at all events where the object of setting "up the articles is to enhance the value of the premises to "which it is annexed for the purposes to which those premises "are applied." I respectfully agree with the warning of Jenkins L.J. in the present case in regard to the different subject-matter of *Holland* v. *Hodgson*.[15] Nevertheless, I think that the above quotation does give assistance on the question of intention. If Mr. Rowe had satisfied me that the intention of the contractors in this case had been ignored, then I should have been prepared to say that the tribunal of fact in this case had misdirected itself in law.

I have carefully considered the case from this aspect. I observe that in the case of *Woodward* v. *Brading & Blundell Ltd.*,[16] on which the decision of the Lands Tribunal in this case is based, Mr. Rowe adduced in support of his contention that the huts in that case were plant within section 24 of the Rating and Valuation Act, 1925, evidence that they were dealt with as stock and loose plant in the accounts of the builders concerned. The Lands Tribunal were unable to find any distinction in substance between the *Woodward* case [17] and the present case; as a result of Mr. Rowe's submission, the builders' intention must have been considered fully in that case, and I do not, therefore, think it would be right to say that it was ignored in this. In my opinion, the proper inference is that the Lands Tribunal assumed that the builders, in their accounts, dealt with these huts in substantially the same way, and if that is so, they must (though they have not expressly so stated) have considered the question of the builders' own intention.

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[12] 14 Q.B.D. 267, 269–271.
[13] [1936] A.C. 511, 566.
[14] (1872) L.R. 7 C.P. 328, 339.
[15] L.R. 7 C.P. 328.
[16] 44 R. & I.T. 793, 798.

It must then be considered whether the tribunal misdirected themselves as to the importance of intention. Mr. Rowe, at one stage, submitted that the true question was whether the person erecting the structures considered them as attached to the soil. He had previously submitted that the annexation of the soil, the period of the erection, the size, quality, amenities and purpose of the structures should be considered, but he qualified this by saying that it was not fatal to his case if the contractor was trying to get the economic equivalent of a rateable structure out of a non-rateable one.

I fear that I cannot appreciate this last refinement. When it is clear that the purpose is to create a hostel, as in *Mitchell Brothers* v. *Worksop Union Assessment Committee*,[18] a bothie, as in *Glasgow Assessor* v. *Gilmartin*,[19] or what was substantially a branch office, as in *John Laing & Son Ltd.* v. *Kingswood Assessment Committee*,[20] it would, in my view, be open to the tribunal of fact to find that a rateable hereditament had been created; in this, as much as in any other branch of the law, a man may be presumed to intend the natural consequence of his acts. If the natural consequence of the manner in which builders erect and use huts like these is that they satisfy what is, in my opinion, the true test of rateability, the tribunal of fact may properly come to the conclusion that those builders so intended, whether or not that was their conscious purpose and whatever they may have called the component parts of the huts.

I think that the respondent's submission was right, namely, that the test of rateability is whether there is evidence that the structures were enjoyed with the land and enhanced its value. In considering this, the intention of the erector and the other elements of annexation, period, size, quality, amenities and purpose are all material. All these factors are important, but intention, and certainly what I may call the "conscious element" in intention, is no more than one factor and its importance is not overriding. The question is eminently one of fact, and whether I should have come to the same conclusion is immaterial. I do not think that there are grounds for saying that the tribunal misdirected themselves or for disturbing their decision. The appeal must therefore be dismissed.

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[17] 44 R. & I.T. 793.

[18] 92 L.T. 62.

[19] 1920 S.C. 488.

[20] [1949] 1 K.B. 344.

Earl Jowitt. My Lords, this is an appeal from a decision of the Court of Appeal, which dismissed an appeal brought by the London County Council as appellants, arising on a case stated by the Lands Tribunal.

Under the Lands Tribunal Act, 1949, s. 3 (4), the decision of the Lands Tribunal is to be final, provided that any person aggrieved by the decision as being erroneous in point of law may ask for a case to be stated. The appellants, being aggrieved, accordingly asked for a case to be stated, and the Court of Appeal considered that the appellants had failed to show that the case so stated revealed any error of law.

The case stated set out the relevant facts, to which I need not refer at length. It is enough to say that the case concerned four disputed structures which were erected by contractors who were to erect a building on a site belonging to the London County Council. The site was handed over to the contractors in December, 1949, and in January, 1950, these structures were brought upon the site. Three of them were finally removed in June, 1951, and the fourth in September, 1951. The structures were manifestly of a purely temporary character and were erected to facilitate the work of the contractors in carrying out their contract with the London County Council.

Under these circumstances it would not have been in the least surprising if the Lands Tribunal had come to a conclusion of fact that the structures were of such a transient nature as to justify their exclusion from the valuation roll, and if the Lands Tribunal had come to such a conclusion I should have thought that there was ample evidence to support them in so finding.

They have expressed the conclusion to which they have come in the following terms: "We came to the conclusion that, while "there were certain differences in detail, we were unable to find

" any distinction in substance between this case and that of " *Woodward* v. *Brading & Blundell Ltd.*,[21] already considered by " this tribunal, and following our usual practice we see no reason " to depart from that decision unless and until it is modified or " reversed by the Court of Appeal." This form of expressing their conclusions obscures the point that the decision to which they have to come is essentially one of fact. I think, however, that the tribunal clearly indicated that, just as they came to a decision of fact in *Woodward's* case,[21] so also (notwithstanding slight differences) they decided that they ought to come to a similar decision of fact in the present case.

On this basis, I think that the point we have to decide is whether we can assert as a matter of law that there was no evidence which could justify the tribunal in coming to such a conclusion. I agree with the Court of Appeal, though, I confess, I agree with some hesitation and reluctance, that we cannot say that the tribunal committed any error of law in arriving at their conclusion.

I can well understand that structures erected by a contractor, even though not intended to be of a permanent character, might be of such an elaborate character as to justify their inclusion in the valuation roll; on the other hand, they might be of such an unsubstantial and ephemeral character as to make it obvious that they should not be included. The distinction between these cases must be one of degree, and therefore of fact, and under these circumstances I am not prepared to differ from the conclusion at which the Court of Appeal arrived.

Accordingly, for the reasons given in the judgments of the Court of Appeal, I would dismiss this appeal.

Lord Oaksey. My Lords, at the hearing of this appeal I inclined to the view that the appeal ought to be allowed on the ground that the huts in question were chattels not forming part of the land and that they were for that reason not rateable, but upon further consideration of authorities which were not all cited to your Lordships I have come to the conclusion that the decision of the Court of Appeal was right.

A consideration of the authorities leads me to the conclusion that an occupier who makes any beneficial use of land is rateable if he does so for a period which is not transient. The contractors undoubtedly occupied the land on which their huts were placed and got benefit from it, and the fact that they did not pay any specific sum for their occupation is irrelevant.

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[21] 44 R. & I.T. 758.

The words of Blackburn J. (as he then was) in *Harter* v. *Salford Overseers*,[22] cited by Buckley L.J. (as he then was) in *Liverpool Corporation* v. *Chorley Union Assessment Committee*,[23] appear to me to show that if a person is capable of maintaining trespass to land, and is enjoying any benefit from the land, he is rateable in respect of that land. As in *Harter* v. *Salford Overseers*,[24] the person rated need not go upon the land or place anything upon the land; it is sufficient if he derives a benefit from the land; in that case by ensuring that the waters on the land would not be polluted or diminished. So in the present case the contractors, by their contract, were entitled to place their huts upon the building site and to have, as the courts below have held, exclusive possession of them, and they undoubtedly derived a benefit from their use of the land for the purpose of storing their property.

I am therefore in agreement with Jenkins L.J. that the case of *Holland* v. *Hodgson*[25] is really irrelevant, since the present question is not whether the huts formed part of the realty by reason of the way in which they were annexed to the land and the intention with which they were so annexed, but whether the contractors had sufficient exclusive possession of the huts that they could maintain trespass in respect of them and derived a benefit from their use for a period which has been found not to be transient.

Since writing the above I have had the opportunity of reading the opinion of my noble friend, Lord Radcliffe, and I agree with it.

Lord Radcliffe. My Lords, I think that this appeal fails. In my opinion the Lands Tribunal made no error of law in holding that the premises now in question were rateable hereditaments, and I agree with the Court of Appeal both in their reasoning and in their conclusion.

I do not wish to do any injustice to the able argument that was submitted to us on behalf of the appellants and it is possible that I am over-simplifying in what I shall say about it, but, as I understood it, the argument concentrated on two aspects of the case, upon each of which, it was said, the tribunal had failed to apply the true law of rating. One was that the structures in question were chattels and, being chattels, were incapable of constituting a rateable hereditament. The other was that the nature of their construction and the circumstances in which they came to be constructed excluded that element of permanence in the occupation which the law requires as a condition of a person's rateability.

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[22] (1865) 6 B. & S. 591, 597.

[23] [1912] 1 K.B. 270, 288; 28 T.L.R. 177 (C.A.); [1913] A.C. 197; 29 T.L.R. 246.

[24] 6 B. & S. 591.

[25] L.R. 7 C.P. 328.

As to the first, I do not regard it as an accepted principle that a structure which is placed on land cannot be a rateable hereditament unless it has ceased to be a chattel in the eyes of the law. The question whether such a structure has been so affixed to the land as to become "part of the freehold" is sometimes an important one when it affects the property rights of two contending parties, and the tests that determine that question, as is shown by the cases of *Holland* v. *Hodgson*[25] and *Hobson* v. *Gorringe*,[26] to an examination of which no small part of the argument before us was devoted, are neither easily ascertained nor easily applied. Indeed, we know from Lord Blackburn's well-known judgment in *Holland* v. *Hodgson*[27]: ". . . it is very "difficult, if not impossible, to say with precision what constitutes "an annexation sufficient for this purpose. It is a question "which must depend on the circumstances of each case." And the difficulty of arriving at any general statement of the tests by which a structure on land is or is not to be found to be legally a chattel is not diminished by the fact that somewhat different considerations apply according to the particular relationship in which the parties, whose property rights are in conflict, stand to each other. In his judgment in *Elwes* v. *Maw*[28] Lord Ellenborough C.J. found it necessary to consider the law of fixtures, itself a somewhat complicated branch of the general law of chattels and realty, under three separate heads distinguished by the varying relationships of the parties concerned, as heir and executor, as executor and remainderman, as landlord and tenant respectively. Since then the industry of the learned editors of Smith's Leading Cases (see 13th ed., vol. II, p. 209) has found it possible or necessary to add four further categories, of which the first, the relationship between vendor and purchaser and mortgagor and mortgagee, is certainly an important one. My Lords, I do not think that all the curious and complicated learning which can be brought to bear upon the question whether a chattel is in law "part of the freehold" when the property rights of contending parties have to be resolved is of any direct assistance when what is in issue is the rateability of a structure by which it is claimed that a person occupying it occupies the land which is its site. For such a purpose we must look to a less meticulous standard of inquiry.

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[25] L.R. 7 C.P. 328.

[26] [1897] 1 Ch. 182; 13 T.L.R. 139.

[27] L.R. 7 C.P. 328, 334.

[28] (1802) 3 East 38.

No one supposes, of course, that a man is rateable in respect of the enjoyment of chattels as he is in respect of the occupation of land. But, on the other hand, I think that that is a long way from saying that the presence of chattels on land can never be a relevant factor either in determining the assessment of the rateable value of a hereditament or in determining whether there is a rateable occupation or not. For instance, in 1906, before the rating of plant and machinery had come under statutory regulation by the Rating and Valuation Act, 1925, this House held in *Kirby* v. *Hunslet Union Assessment Committee*[29] that a factory's assessment to poor rate must be based on the standing equipment of machinery in the factory, irrespective of whether or not it was affixed to the freehold so as to form part of it. In doing so, as Lord Macnaghten pointed out,[30] the House was doing no more than affirm a rule that had constantly been applied throughout the preceding 50 years.

On the second point, I think it equally well established that a structure placed upon another person's land can with it form a rateable hereditament, even though the structure remains in law a chattel and as such the property of the person who placed it there. It has been habitual practice to treat gas and water pipes, drains and sewers, telegraph posts placed in and telegraph or telephone wires placed over land as being themselves rateable subjects, yet I do not think that there is any foundation for supposing that when the undertaker, equipped either with the licence of the owner of the soil or with statutory powers, affixes his apparatus to a building or lays it in or on the soil the law regards him as thereby making it part of the freehold. It is quite common in these cases to find stress laid on the point that the apparatus concerned remains the "exclusive property" of the undertaker (see *Lancashire and Cheshire Telephone Exchange Co.* v. *Manchester Overseers*,[31] *per* Brett M.R.), yet without the undertaker acquiring "any freehold or leasehold interest in the "soil" (see *Reg.* v. *West Middlesex Waterworks Co.*,[32] *per* Wightman J.). I do not know that, if one is to look for general principle, it is necessary to go further than the case of *Cory* v. *Bristow*.[33] In all the successive stages of hearing in that case[34] I do not think that any judge, except possibly Mellish L.J. in the Court of Appeal, considered it relevant to inquire whether the moorings laid in the Thames, the subject that was claimed as the rateable hereditament, were themselves part of the soil in the sense that they were affixed to the freehold. On the contrary, judges seem to have been at pains to allude to the fact that the conservators who owned the freehold of the bed of the river had no interest in the moorings whatsoever and that these, which amounted in effect to a great pile of rubble deposited on a part of the bed scooped out for the purpose, remained the sole and exclusive property of the company which had placed them there. Yet the moorings were a rateable subject and the company rateable as occupiers; for, as James L.J. said in the Court of Appeal[35]: "There is no dispute as to the general principle of law, "viz., that where any part of the soil is permanently occupied "by anybody for profitable purposes, as, for instance, when it is "occupied by a company by means of its water or gas pipes or "telegraph posts, then the person so occupying is rateable in "respect of such occupation . . ."

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[29] [1906] A.C. 43; 22 T.L.R. 167.
[30] [1906] A.C. 43, 50.
[31] 14 Q.B.D. 267, 270–271.
[32] (1859) 1 E. & E. 716, 720.

With the law of rating formed in this way, the decision of this House in *Westminster Council* v. *Southern Railway Co.*[36] is only a natural application of it. The whole issue was whether certain buildings or structures, situated within the general confines of the railway station premises, had been "so "let out as to be capable of separate assessment." Certain of the structures, such as kiosks, small shops and show cases, rested on the ground by their own weight and would not have satisfied the usual requirements of the law of fixtures of being so attached to the soil as to form part of the freehold. Of course if, being chattels, they could not for that reason alone be the subject of assessment, there was an end of the matter. Yet no member of your Lordships' House thought it necessary to consider whether the nature of their attachment to the soil made it impossible to say that in law they constituted rateable subjects and as such capable of separate assessment. In the result it was held that they were so capable, since they were in separate occupation and the occupation itself possessed a sufficient "degree of permanence."

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[33] 2 App.Cas. 262.

[34] (1875) L.R. 10 C.P. 504; (1875) 1 C.P.D. 54 (C.A.).

[35] 1 C.P.D. 54, 55.

[36] [1936] A.C. 511.

H. L. (E.)
1956

LONDON COUNTY COUNCIL v. WILKINS (VALUATION OFFICER).

Lord Radcliffe.

My Lords, I think that the appellants' argument involved at one stage the proposition that, even if the surface or stratum of the land itself constituted a rateable hereditament in cases such as those I have been describing, the definition of the hereditament must be confined to the land and must not extend to the structure upon it so long as the structure remained legally a chattel. I cannot find that this distinction is borne out by the authorities and in principle I do not agree with it. When the owners of pipes, cables, posts, etc., are rated as occupiers they are rated in respect of those things themselves, by means of which they occupy land, not merely in respect of the land that is occupied: just as in *Cory* v. *Bristow* [37] it was the moorings themselves that were treated as the rateable hereditament. Indeed, in *Mitchell Brothers* v. *Worksop Union Assessment Committee*,[38] a case which I regard as indistinguishable in all essentials from that now under appeal, the result was achieved of rating the contractor's huts as rateable hereditaments without any alteration of the rating assessment of the area of land on part of which they stood.

In my opinion, the present case really centres round the question whether the sheds, erected on a building site by a building contractor for the purpose of his operations, involve such a degree of permanency in his occupation as to make it a rateable one. I have no doubt that, in considering this, it is at any rate relevant to ascertain to what extent and in what way these constructions have been made a fixed part of the site on which they stand, for the more casually they are attached the less likely it is that the occupation of them will be found to be a permanent one. In this sense it may be of some importance to inquire whether they are chattels or not. But to make the whole issue of rateability depend on the bare issue, for instance, whether a particular structure has or has not foundations in the ground which give it a measure of lateral as well as subjacent support would be to use a legal distinction for a purpose for which it was never intended.

Is there, then, any error of law in the Lands Tribunal's holding that the appellants' occupation of the huts is a rateable one? I think not. Certain circumstances were dwelt upon in argument which were said to tell against rateability, but, as I see it, they are circumstances from which no legal consequence properly results. Building sites themselves are not treated as rateable hereditaments while the work of building is in progress. But, that being so, I see no reason why any particular part of the site, if sufficiently defined by the fact of its appropriation for the support of a building or structure, should not itself thereby become rateable: *John Laing & Son Ltd.* v. *Kingswood Assessment Committee.*[39] In that case the building owner himself specified the site to be reserved for contractors' buildings: here it was left to the contractor himself to appropriate what and as he required. But I see no importance in this distinction, given that a defined site is appropriated and used as the floor of a building.

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[37] 2 App.Cas. 262.

[38] 92 L.T. 62.

Certainly it is true that the law demands that an occupation to be rateable should be permanent. But then it is equally certain that permanence does not connote what it might appear to in this connexion. It is rather easier to say what it does not mean than what it does. An occupation is not the less permanent because it is that of a lessee who holds under a lease for a fixed term. In other words, there is permanent occupation however clearly the end may be in sight. More than that, an occupation can be permanent even though the structure or other chattel which is the means of occupation is removable on notice. It is not necessary to go so far as Lord Campbell C.J., who suggested that a water company whose pipes were liable to be resited by paving commissioners as occasion required were rateable because they had "a movable freehold": *Reg.* v. *East London Waterworks Co.*[40] It may be that "permanent" signifies no more than continuous, as opposed to intermittent, physical possession of the soil, as is suggested by the learned editors of Ryde on Rating (see 10th ed., p. 39). However that may be, it is well settled that a tenant at will has an occupation that is sufficiently permanent to carry rateability. If so, I see no reason why the contractor's occupation of his huts during the pendency of the building contract should not produce a similar result.

This is not, after all, a new question. It came up in 1904 in *Mitchell Brothers* v. *Worksop Union Assessment Committee*,[41] where Lord Alverstone C.J. ignored what I may call the chattel argument and decided that the contractor's structures were rateable. It came up again in *Cleveland Bridge and Engineering Co. Ltd.* v. *Darlington Union Assessment Committee*,[42] and the decision there against rateability was based solely on the ground that the employer's control was of such a nature that there was no exclusive occupation. Lastly, it came up in the *John Laing* case,[43] although it is quite true to say that the particular point which we are now invited to consider was there not directly challenged. Each decision, no doubt, has to be related to its own particular facts. But, in my opinion, within very wide limits, which are not overstepped in the present case, the question whether there is sufficient permanency of occupation is essentially a question of degree and as such is a proper question for the final determination of the Lands Tribunal. If the evidence had been, as it was not, that the huts or sheds were constantly being moved from one site to another, so that there was no real appropriation of any particular area of soil to the purposes of occupation, I can see that it might be necessary to say that the law did not admit so transient an occupation to be a rateable one. But all that we know is that one structure was once moved during the course of the operations and I do not think that we ought to assume that the occupation was in fact more transient than the evidence suggests. If so, 18 months on the site does not present itself to me as something inherently too brief for rateability. The rate is an annual impost on the occupier in respect of his profitable occupation of land; it is not a capital charge on the owner in respect of the property interest in the soil. If such an occupation in fact endures for a year or more I do not see why the occupier should not contribute to the current fund of the rating area for that period. The mere brevity of his occupation will be itself the cure of any hardship in his liability.

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[39] [1949] 1 K.B. 344.

[40] (1852) 21 L.J.M.C. 174, 178.

[41] 92 L.T. 62.

[42] (1923) 21 L.G.R. 511.

[43] [1949] 1 K.B. 344.

Lord Tucker. My Lords, the decision of the Lands Tribunal with regard to the structures under consideration in the case stated was as follows: "We came to the conclusion that, while "there were certain differences in detail, we were unable to find "any distinction in substance between this case and that of "*Woodward* v. *Brading & Blundell Ltd.*[44] already considered by "this tribunal, and following our usual practice we see no reason "to depart from that decision unless and until it is modified or "reversed by the Court of Appeal."

In order, therefore, to ascertain what were the findings of fact in the present case, it is necessary to refer to the tribunal's decision in *Woodward's* case.[44] In that case, which, like the present, was concerned with builders' huts erected on building sites for the duration of building contracts, the tribunal stated their decision in the following words[45]: "We are satisfied, on the facts sub-"mitted to us, not only that the buildings which are the subjects "of these appeals are of rateable types, but that each of the

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[44] 44 R. & I.T. 793.

[45] Ibid. 797.

"ratepayers had actual possession and an exclusive beneficial "occupation for the purpose of carrying out the respective contract; and, furthermore, that the possession by the ratepayers "in each of the cases had a sufficient quality of permanence to "justify the valuation officer in making his proposal."

The huts in the present case were erected in January, 1950, and consisted of (*a*) general foreman's and timekeeper's office, being a wooden sectional hut with wood roof covered by tarred felt with wood floor on sleepers. It was moved once during the building operations from one position to another on the site. It was dismantled in September, 1951; (*b*) cement store with corrugated iron sides and roof with concrete floor. Dismantled, June, 1951; (*c*) canteen and store. A wooden sectional hut with wood roof covered by tarred felt and a wooden floor. Dismantled, June, 1951; (*d*) plumbers' store. Corrugated iron sides and roof standing on old roadway or playground site. Dismantled, June, 1951. These huts were erected on the actual building site, no particular area having been set aside for the purpose, the contractors choosing the particular site in each case. The contract time for completion of the operations was 12 months, but, as will be seen from the dates at which the huts were dismantled, this period was exceeded by some six months or more, so that the huts were in the occupation of the contractors for about 18 months. The case contains no specific finding to this effect, but it is, I think, obvious from the above descriptions that none of these huts were "portable" in the sense that they could be taken up and removed intact, but, on the other hand, with the exception of the concrete floor in (*b*), they were all "removable" in the sense that they could be easily dismantled and re-erected.

It being admitted that there is no material distinction between the huts in this case and those in *Woodward's* case,[46] the Lands Tribunal must, I think, be taken to have decided that: 1. The huts, together with the land on which they stood, constituted separate rateable hereditaments. 2. The contractors had actual possession of them. 3. Their possession was exclusive for the purpose of performing their contract. 4. It was beneficial. 5. It had a sufficient degree of "permanence" to attract rateable liability.

My Lords, these findings, which are all necessary before liability can attach, are largely matters of fact and degree in every case, and the tribunal not having, in my view, in any way misapprehended the law, it is, I think, impossible to say that there was no evidence upon which they could have come to these conclusions. I do not understand that findings 2, 3 and 4 above are challenged provided numbers 1 and 5 can be sustained.

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[46] 44 R. & I.T. 793.

A hereditament only becomes a subject of rateability if there is a sufficient element of " permanence " in its occupation. This is essentially a question of fact and degree. It has long been settled that occupation for a defined period of time or even under a tenancy at will or by virtue of licence subject to revocation at any time may not be too transient to be regarded as " permanent." See, for example, *Cory* v. *Bristow*,[47] where the moorings were subject to removal at a week's notice from the conservators. If, therefore, the sites on which these huts stood, apart altogether from the huts themselves, were exclusively and beneficially occupied by the contractors for a sufficient length of time, they would become rateable hereditaments. The presence of the huts thereon would merely be an element enhancing the value of their occupation. In this case their presence is also a factor to be taken into consideration in deciding whether there has been a sufficient " carving out " or appropriation of a particular portion of the site to amount to exclusive occupation by the contractors.

I do not think the fact that no particular area was defined by the contract as the site for the huts is decisive in favour of the appellants, if, in fact, the contractors had the right to select the sites and did in fact select and exclusively occupy certain sites with the licence of the building owners for a sufficient length of time. I find difficulty in distinguishing the consequences in each case. In my view, on the undisputed facts it is impossible to hold as a matter of law that there was no evidence to warrant the finding that there was in this case a sufficient " carving out " or " appropriation " and sufficient degree of permanence to give rise to rateability unless the appellants can make good their submission that these huts, by virtue of their construction and liability to removal, were to be regarded as mere chattels which cannot be the subject of rating or even taken into account as enhancing the value of the occupation of an otherwise rateable piece of land.

My Lords, I do not think this submission is sound or supported by authority. I can derive no assistance in the field of rating law from authorities dealing with fixtures as between landlord and tenant or mortgagor and mortgagee or the law of larceny.

As far back as 1904 it was decided in *Mitchell Brothers* v. *Worksop Union Assessment Committee*[48] that builders' huts temporarily erected and occupied by the builder can be rateable hereditaments. A similar decision was reached by the Court of Session in Scotland in 1920 in *Glasgow Assessor* v. *Gilmartin*[49] under statutes the language of which, it is true, is slightly different from that of the relevant English Acts.

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[47] 2 App.Cas. 262.

[48] 92 L.T. 62.

The submission is also, I think, irreconcilable with the decision in *Cory* v. *Bristow*[50] where Lord Cairns L.C. and Lords Hatherley and O'Hagan all held that, although the moorings were attached to the bed of the river so as to become part of the realty, they remained the property of the appellants, who were held liable to be rated in respect of their occupancy thereof.

Furthermore, a decision in favour of the appellants would, in my view, be contrary to the basic reasoning of the speeches in this House in *Westminster Council* v. *Southern Railway Co.*[51] It is true, as pointed out by counsel for the appellants in the present case, that in that case the whole area of Victoria Station was, in any event, rateable, and the only question was whether certain persons other than the company should be separately rated in respect of certain portions or whether the whole was a railway hereditament. None the less, in order to be separately rated, the portions in question had to come within the proviso to section 1 (3) of the Railways (Valuation for Rating) Act, 1930, which enacted "No premises . . . so let out as to be capable of separate assess-"ment shall be deemed to be, or to form part of, a railway "hereditament."

This House held that various structures, some of which were easily removable and were in the nature of chattels, were so let out as to be capable of separate assessment. Having regard to the counsel engaged in the case and the elaborate speeches of their Lordships, it would be remarkable if it had escaped the notice of all concerned that the short answer to the case was that the chattel character of the structures of itself alone rendered them incapable of being "let out so as to be capable of separate "assessment."

My Lords, I refrain from quoting at length from the speeches in that case and content myself with stating that in my view their reasoning is destructive of the submission made on behalf of the appellants in the present case.

My Lords, in my opinion, there was evidence upon which the Lands Tribunal could hold that these structures were "buildings" which, under Schedule III of the Valuation (Metropolis) Act, 1869, constitute the hereditaments to be inserted in the valuation list. I should, however, add one qualification or note of warning. There is a finding in the case that one of the huts had been moved on one occasion. It is not stated for what period it remained on each site. The question of actual removal during the relevant period is a matter of considerable importance because it must result in two different hereditaments for different periods of time and would also be relevant on the question of transience. I am prepared to assume, in the absence of findings to the contrary, and having regard to the fact that your Lordships were not invited to differentiate between the four huts, that this particular hut remained on one site for a sufficient length of time to provide the necessary element of permanence.

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[49] 1920 S.C. 488.

[50] 2 App.Cas. 262.

[51] [1936] A.C. 511.

For these reasons I would dismiss the appeal.

Appeal dismissed.

Solicitors: *J. G. Barr; Solicitor of Inland Revenue.*

F. C.

[HOUSE OF LORDS.]

H. L. (E.)*
1956
July, 2, 3, 25.

KONINKLIJKE ROTTERDAMSCHE LLOYD (N.V.) . . . . APPELLANTS;

AND

WESTERN STEAMSHIP CO. LTD. . . RESPONDENTS.

THE EMPIRE JAMAICA.

Shipping—Limitation of liability—Fault or privity—Vessel manned with insufficient number of certificated officers—Collision occurring during watch of uncertificated officer—Actual fault or privity of owners—Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 503 *—Merchant Shipping (Amendment) Ordinance, No.* 2 *of* 1949 *(Hong Kong).*
Causation.

By section 4 (3) of the Hong Kong Merchant Shipping Ordinance, 1899, as amended by the Merchant Shipping (Amendment) Ordinance, 1949: "Every British ship shall, . . . when

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* *Present*: LORD MORTON OF HENRYTON, LORD MERRIMAN, LORD GODDARD, LORD COHEN and LORD KEITH OF AVONHOLM.

"leaving any port of the Colony, be provided with officers who "possess certificates of competency of a grade appropriate to their "stations in the ship or of a higher grade, according to the "following scale: (a) in any case, with a duly certificated master; "(b) if the ship is of 100 tons or upwards, with at least one officer "besides the master holding a certificate not lower than that of "only mate, or of second mate in the case of a sailing ship of not "more than 200 tons; (c) if the ship carries more than one mate, "with at least the first and second mates duly certificated." By subsection (19A), added by the Emergency (Merchant Shipping Ordinance, 1899) (Amendment) Regulations, 1951, provision was made for obtaining exemption from the Governor in Council from any requirement contained in the Ordinance.

A steamship of over 3,000 tons within the Ordinance was involved in a collision, through the negligence of an uncertificated officer. The only certificated officers were the master and the first mate, but the ship de facto carried three mates, although the other two officers were not so described. No exemption had been applied for in respect of the requirement of section 4 (3) (*c*). If it had been, either it would have been granted or the shipowners would have been told that it was unnecessary. In an action by the owners to limit their liability under section 503 of the Merchant Shipping Act, 1894:—

Held, that whether or not there had been a breach of section 4 (3) (*c*), there was, on the evidence, no causal connexion between the breach and the collision. Accordingly, since the owners had shown that they had good reason to believe that the uncertificated officer was competent to perform his functions, they had discharged the onus of proving that the damage occurred without their actual fault or privity.

Per Lord Merriman. The owners were in breach of section 4 (3) (*c*).

Decision of the Court of Appeal [1955] P. 259; [1955] 3 All E.R. 60 affirmed.

APPEAL from the Court of Appeal (Evershed M.R., Jenkins and Parker L.JJ.).

This was an appeal from a judgment of the Court of Appeal dated July 12, 1955, affirming a judgment of Willmer J. dated January 27, 1955, whereby permission was granted to the respondents, Western Steamship Co. Ltd., to limit their liability, in accordance with the Merchant Shipping Acts, for damage caused to innocent parties as the result of a collision between their steamship *Empire Jamaica* (since renamed *Westway*) and the motor vessel *Garoet*, belonging to the appellants, N. V. Koninklijke Rotterdamsche Lloyd, in the Java Sea on September 1, 1951. The respondents had admitted sole liability for the collision.

The *Empire Jamaica* was of 3,538 tons gross, 315·5 feet in length and 46·5 feet in beam and was registered at the port of

Hong Kong. At the material time she was laden with about 3,700 tons of cement and was in the course of a voyage from Djakarta to Semarang, manned by a crew of 48 hands.

The facts are stated in the opinion of Lord Morton of Henryton.

R. F. Hayward Q.C. and *Derek Hene* for the appellants. On the evidence the respondents have not proved that the collision occurred without their actual fault or privity. Further, they are in breach of section 4 of the Hong Kong Merchant Shipping Ordinance, 1899, as amended by the Merchant Shipping (Amendment) Ordinance, 1949. Accordingly, their claim to limit their liability under section 503 of the Merchant Shipping Act, 1894, must fail.

In the ship the first mate alone was duly certificated; Sinon, shipped as second mate, was not. This was a breach of section 4 (3) (*c*) of the Ordinance on the part of the respondents, who did not get an exemption in respect of him under section 4 (19A) at the material time.

As to the insufficiency of the evidence under the section, there is no direct authority, and *Standard Oil Co. of New York* v. *Clan Line Steamers Ltd.*,[1] referred to by Evershed M.R. in the Court of Appeal, is not much help. The judge's finding that there was no causal connexion between the respondents' fault and the damage was not justified. They have not shown that their failure to get a dispensation in respect of Sinon may not have contributed to the collision. If an exemption had been applied for under section 4 (19A) he would have undergone an examination on behalf of the Marine Department at Hong Kong as to his fitness to fulfil a second mate's duties. He might have been found unfit. At any rate, his attention would have been directed to the regulations for preventing collisions at sea, which he must have neglected, since the collision occurred.

The onus was on the respondents to show that the ship was properly manned. *The Bristol City*[2] is an analogous case. See also *Asiatic Petroleum Co. Ltd.* v. *Lennard's Carrying Co. Ltd.*,[3] *Lennard's Carrying Co. Ltd.* v. *Asiatic Petroleum Co. Ltd.*[4] and *Admiralty* v. *Divina* (*Owners*) (*The Truculent*).[5] The test is: have the respondents discharged the onus of proving that their action or inaction with regard to Sinon's employment did not contribute to the collision and the consequent damage? They knew or should have known that before sending the ship to sea they must comply with the law as to manning by getting an exemption for him, if they could. In fact they took no steps to do so until two-and-a-half years after the collision and six months after the start of the limitation action.

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[1] [1924] A.C. 100; 40 T.L.R. 148.

[2] [1921] P. 444; 37 T.L.R. 901.

[3] [1914] 1 K.B. 419; 29 T.L.R. 739.

[4] [1915] A.C. 705; 31 T.L.R. 294.

[5] [1952] P. 1; [1951] 2 T.L.R. 895; [1951] 2 All E.R. 968.

Derek Hene following. Section 92 of the Merchant Shipping Act, 1894, which in substance contains the same requirement as section 4 (3) (*c*) of the Ordinance of 1949, would make no sense if it did not mean that in such a ship as this more than one mate must be certificated. There was here an obligation in law, to be strictly complied with, that the mates were to be certificated or an exemption was to be obtained.

There was a causal connexion between the breach of the regulation and the negligent navigation of the ship. To succeed, the respondents would have to show that, even if the regulation had been complied with, the collision would still have happened. The onus on the respondents, who have broken a safety regulation, is particularly heavy to discharge. As to the weight to be given to affidavit evidence, see *The Parisian*,[6] in relation to the affidavit of Leung Yew, the respondents' managing director. In view of the difficulties of bringing a witness from abroad, affidavit evidence is usually accepted, but a party cannot pray that in aid. Unless the respondents can show that Sinon was as good as a certificated man or better, they must fail. They must fail unless they can show that the examination or test would not have disclosed that he was not as good as a certificated man or better. As to the value of a certificate, admittedly a qualified surgeon may fail in an operation, but a hospital would be guilty of negligence if it allowed an operation to be performed by a student or a young man who had never worked alone before. The prescribed test here was directed to the specific job in hand. *The Denarli*[7] shows the high value placed on safety regulations and the difficulties in the way of one who has violated them and is seeking to limit his liability. Although there are concurrent findings of fact the House is free in its decision. This case is different from *Paterson Steamships Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*[8]

Kenneth Carpmael Q.C. and *J. B. Hewson* for the respondents. As to the onus of proof resting on the respondents, they

[6] (1887) 13 P.D. 16.

[7] 1940 A.M.C. 877, 887.

[8] [1934] A.C. 538, 548–549; 51 T.L.R. 5.

had to provide, or do their reasonable best to provide, competent persons as ship's officers, and if they establish that they did do so they are entitled to succeed. That is, in effect, what Parker L.J. said in the Court of Appeal.[9] The respondents have shown that, in all the circumstances, they had good reason to believe that Sinon was fully competent to perform his functions, including keeping watch. Accordingly, they have established that the accident occurred without their fault or privity.

As to section 4 (3) of the Ordinance, on its true construction, the respondents have complied with it. Under section 4 (3) (*b*) this vessel might sail "with at least one officer besides the master "holding a certificate not lower than that of only mate." This requirement was here complied with because the master and the first mate were both duly certificated. Accordingly, in this respect the vessel was properly manned, and section 4 (3) (*c*) need not be considered; section 4 (3) (*b*) and (*c*) are alternative and not cumulative, and the latter does not apply here. But, even if this is not so, section 4 (3) (*c*) does not apply to this case, since Sinon was not a mate within the meaning of its requirements. The vessel did not carry more than one mate, because the description of a person as "mate" assumes that he holds a certificate as such, and here only the first mate did so. This is in accordance with a reasonable interpretation of the section and it should be adopted. It is hard to treat any other reading as meaning anything at all. On the uncontradicted evidence of Jolly the respondents properly complied with the law of Hong Kong as to manning. They were entitled to rely on the fact that he was satisfied in this respect and that a clearance was granted on the voyage.

Even if there was a breach of the requirements of the section, and section 4 (19A) as to obtaining an exemption was not complied with, there was no causal connexion between the breach and the accident.

As to the question of actual fault or privity, see *Asiatic Petroleum Co. Ltd.* v. *Lennard's Carrying Co. Ltd.*[10]

This is simply a case of a competent man who had a lapse on one occasion.

R. F. Hayward Q.C. in reply. If the respondents' construction of section 4 (3) were right it would be permissible to send the *Queen Mary* out from Hong Kong with a master and a first officer. That would be to put too great a strain on the words. That construction would mean that on such a ship as this the watch could only be kept with a great strain. The proper meaning is that a ship should have three certificated officers, a master and two others. The mate is a helper or lieutenant of the master.

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[9] [1955] P. 259, 272; [1955] 3 All E.R. 60.

[10] [1914] 1 K.B. 419, 431–432.

Their Lordships took time for consideration.

July 25. LORD MORTON OF HENRYTON. My Lords, the present appeal arises out of a collision between the steamship *Empire Jamaica* (now named *Westway*) belonging to the respondents, and the appellants' motor vessel *Garoet.* The collision took place in the Java Sea early on the morning of September 1, 1951, and considerable damage was done to both vessels. At the time of the collision the officer on the watch in the *Empire Jamaica* was a Mr. Sinon.

On October 8, 1951, the appellants issued a writ against the respondents claiming damages. The claim was resisted until after pleadings had been closed, but on December 5, 1952, the respondents admitted sole liability for the collision. On October 19, 1953, the respondents commenced the present action for limitation of their liability under section 503 (1) of the Merchant Shipping Act, 1894, the relevant part whereof is as follows: "The owners of a ship, British or foreign, shall not, "where all or any of the following occurrences take place without "their actual fault or privity; (that is to say,) . . . (*d*) Where any "loss or damage is caused to any other vessel, or to any goods, "merchandise, or other things whatsoever on board any other "vessel, by reason of the improper navigation of the ship; be "liable to damages beyond the following amounts; (that is to "say,) . . . (ii) In respect of loss of, or damage to, vessels, goods, "merchandise, or other things, . . . an aggregate amount not "exceeding eight pounds for each ton of their ship's tonnage."

In their statement of claim the respondents admit that the said collision and damage consequent thereon were caused by the improper navigation and/or management of the *Empire Jamaica* by their servants, but say that the collision occurred without the actual fault or privity of the respondents and consequently their liability in damage is limited to £8 per ton of the tonnage of the *Empire Jamaica.*

The *Empire Jamaica* is a vessel of some 3,538 tons gross, and at the time of the collision she was carrying a certificated master, a certificated first mate, and two other officers who were not certificated. These two officers were Mr. Sinon, who was described in the ship's "particulars of engagement" as "chief "boatswain," and a Chinese officer, who is described as "third "officer." Willmer J. found that[1]: "This ship de facto carried "three mates. I say 'de facto' because, although Sinon is not "so called, I am satisfied that she carried these three men to "perform the duties of mates, and that they were in fact "employed and paid as such."

The contentions of the parties in your Lordships' House may be summarized as follows: The respondents allege that, in all the circumstances of the case, they had good reason to believe that Mr. Sinon was fully competent to perform the functions which would fall upon him, including the keeping of a watch. Thus the collision occurred without their actual fault or privity. The appellants contend that the evidence adduced by the respondents fails to prove this allegation. In addition to criticizing the evidence of the respondents' witnesses, the appellants allege that the respondents were in breach of the provisions of section 4 of the Hong Kong Merchant Shipping Ordinance, 1899, as amended by the Merchant Shipping (Amendment) Ordinance, 1949 (No. 2 of 1949). As to the last-mentioned allegation, the respondents say, first, that they were not in breach of the Ordinance and, secondly, that if they were in breach, the breach had no causal connexion with the collision.

The trial judge held that the respondents had good reason to believe that Mr. Sinon was fully competent to discharge the duties of second mate, which he was in fact discharging upon the voyage in question, and the three members of the Court of Appeal agreed with this view. All the evidence has been read to your Lordships, and I understand that you all think, as I do, that apart from the question as to the alleged breach of the Hong Kong Ordinance by the respondents, there is no reason to differ from the view of the trial judge and the Court of Appeal. I therefore refrain from any detailed comment on the evidence.

I now turn to the alleged breach of the Hong Kong Ordinance. The relevant part of the Ordinance is as follows: Section 4 (3): "Every British ship . . . shall when leaving any port of the "Colony, be provided with officers who possess certificates of "competency of a grade appropriate to their stations in the ship "or of a higher grade, according to the following scale: (*a*) in any "case, with a duly certificated master; (*b*) if the ship is of 100 "tons or upwards, with at least one officer besides the master "holding a certificate not lower than that of only mate, or of

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[1] [1955] P. 52, 56; [1955] 1 All E.R. 452.

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"second mate in the case of a sailing ship of not more than "200 tons; (c) if the ship carries more than one mate, with at "least the first and second mates duly certificated."

Section 4 (19A) of the Merchant Shipping Ordinance, 1899, as amended by the Emergency (Merchant Shipping Ordinance, 1899) (Amendment) Regulations, 1951, provides as follows: "The Governor in Council may, if he thinks fit, and upon such "conditions (if any) as he thinks fit to impose, exempt any ship "from any specified requirement contained in, or prescribed in "pursuance of, this Ordinance, or dispense with the observance "of any such requirement in the case of any ship, if he is "satisfied that that requirement has been substantially complied "with in the case of that ship, or that compliance with the "requirement is unnecessary in the circumstances of the case, "and that the action taken or provision made as respects the "subject-matter of the requirement in the case of the ship is as "effective as, or more effective than actual compliance with the "requirement."

Counsel for the appellants contend that the *Empire Jamaica* carried more than one mate; that only the first mate was duly certificated, and that the respondents committed a breach of section 4 (3) (*c*) in shipping as second mate a man (namely, Mr. Sinon) who was not duly certificated. They say further (and this is not disputed) that the respondents had not obtained any exemption under subsection (19A) at the relevant period, though they did obtain an exemption in March, 1954, when Mr. Sinon was still serving as second mate. They go on to submit that if the respondents had applied for exemption Mr. Sinon would have been examined by an officer of the Marine Department in Hong Kong as to his fitness to discharge the duties of second mate, and he might have been found unfit to discharge these duties; or at least his attention would have been directed to the regulations for preventing collisions at sea, one or more of which he must have neglected when the collision occurred.

My Lords, I fully appreciate the importance of a strict compliance with section 4 (3) of the Ordinance, but the argument of the appellants is met by counsel for the respondents as follows. They submit, first, that they were not in breach of the Ordinance, because section 4 (3) (*b*) permits a ship of 100 tons or upwards to sail "with at least one officer besides the master holding a "certificate not lower than that of only mate," and the master and first mate of the *Empire Jamaica* both held the requisite certificate. They further submit that Mr. Sinon was not a "mate" or a "second mate" within the meaning of section 4 (3) (*c*). Finally, they submit that, if there was a breach of the subsection, that breach had no causal connexion whatsoever with the collision.

The first two of these submissions were never put forward in the courts below, but they are, I think, covered by the reasons to be found at the end of the respondents' printed case on this appeal. My Lords, I am not impressed by either of these submissions, having regard to the terms of section 4 (3) (*c*), but I find it unnecessary to express any opinion upon them, because I am satisfied that the respondents' final submission is well founded. It is based upon the affidavit of Mr. James Jolly, sworn on December 3, 1954, and the affidavit of Mr. Leung Yew, sworn on December 2, 1954. Mr. Jolly's affidavit must be quoted in full:

"1. I am the Director of Marine of Hong Kong appointed on "June 17, 1941, and I have held this position since.

"2. My duties are those of the head of the Marine Depart-"ment in Hong Kong and I am charged with carrying into "effect in the Colony of Hong Kong the provisions of the Mer-"chant Shipping Act of the United Kingdom in so far as it is "applicable to Hong Kong and the Hong Kong Merchant "Shipping Ordinance. I am currently, by reason of the pro-"visions of the Hong Kong Merchant Shipping Ordinance, "superintendent of the Mercantile Marine Office. I myself and "my department acting under me are responsible for (inter alia) "opening and closing ships' articles, the engagement and dis-"charge of seamen, the granting of certificates of competency, "the clearance of vessels and are concerned that the provisions "of the said Act and Ordinance are duly complied with. If not "satisfied in any case that the Act (in so far as applicable) "and/or the Ordinance have been duly complied with, I or my "department as circumstances require would refuse to grant a "clearance permitting a vessel to proceed to sea.

"3. I have examined the official records in my office and from "these I am able to certify that articles of agreement with the "crew of the *Empire Jamaica* were opened in my office on "July 3, 1951, and terminated on October 1, 1951, during which "period no changes whatsoever were made in the entire crew.

"4. At the material time there was a shortage of British "certificated officers in Hong Kong and it was the general "practice to grant an exemption in accordance with subsection "(19A) of section 4 of the Hong Kong Merchant Shipping

"Ordinance No. 10 of 1899 in respect of ships registered in "Hong Kong.

"5. It was also the practice in Hong Kong to sign on "uncertificated men, described in the articles as boatswain or "chief boatswain or as a mate, but owners were not required by "my department to do other than comply with section 4 (3) (*b*) "of the Ordinance and were not required to comply with subsection (3) (*c*).

"6. At the time when the articles were opened in July, 1951, "I was under the impression that the *Empire Jamaica* had "already been included in the lists of vessels submitted by me "for inclusion in an exemption by the Governor in Council under "subsection (19A) and I was satisfied that the *Empire Jamaica* "was properly manned.

"7. At the time such articles were opened I was aware that "the *Empire Jamaica* was to carry only one certificated mate in "addition to the certificated master, and I was satisfied that this "was proper compliance with the law of Hong Kong.

"8. Accordingly I was and still am satisfied that in July, 1951, "the *Empire Jamaica* was properly manned in all respects and "I would have so certified to her owners."

The relevant portions of Mr. Leung Yew's affidavit are as follows:

"1. I am the managing director of the Western Steamship "Co. Ltd. I have been engaged in the shipping business since "about 1929 or 1930.

"2. The company usually acts in accordance with decisions "which I make in the ordinary course of business, though from "time to time decisions on matters which are not in the ordinary "course of business will be referred to the board of directors.

"3. The opening of articles is not a matter which requires my "personal attention. It is in fact a matter only concerning the "captain and crew members and the Mercantile Marine Office. "Without hesitation I can say that it is not the usual practice "in Hong Kong for managers or managing directors of shipping "companies to attend at the opening of articles.

"4. I had always understood from the Marine Department "of Hong Kong that if a ship carried more than one mate and "the first mate was certificated it was not necessary for the "other mates to be certificated. I know that the Marine Department sometimes suggested the signing on of a chief boatswain "and no second officer. I was well aware that the signing on of "a first mate, chief boatswain and a third mate, possibly even "a fourth mate, was a practice which satisfied the officials in the "Mercantile Marine Office at Hong Kong."

My Lords, in view of this evidence I am satisfied that if the respondents were in breach of the Ordinance in shipping Mr. Sinon as second mate without obtaining exemption, under subsection (19A), from the provisions of section 4 (3) (*c*), that breach had no causal connexion whatsoever with the collision. It is clear that if the respondents had applied for exemption, Mr. Jolly, acting for the Governor, would either have granted exemption at once or (more probably) would have said, "You do not need "any exemption, as you comply with section 4 (3) (*b*)"—see paragraphs 5 and 7 of his affidavit. Mr. Jolly's construction of the Ordinance may have been wrong, but the result is that if the respondents had taken the step which, according to the appellants, they ought to have taken, Mr. Sinon would still have been on duty in the early morning of September 1, 1951, and the collision would still have occurred.

For these reasons I am of opinion that the trial judge and the Court of Appeal arrived at the right conclusion, and I move that this appeal be dismissed.

LORD MERRIMAN. My Lords, I have had the advantage of reading the opinion of Lord Morton of Henryton. I so fully agree with his conclusion that I might not have thought it necessary to add anything but for the fact that the two points which, as my noble and learned friend has said, were argued for the first time in your Lordships' House, seem to me to raise questions of general importance.

The judgments in the court below are based on the assumption that there was a breach of the Merchant Shipping (Amendment) Ordinance, 1949, s. 4 (3) (*c*), which reads as follows: "if "the ship carries more than one mate, with at least the first and "second mates duly certificated." In substance this requirement is to the same effect as is provided by the Merchant Shipping Act, 1894, s. 92 (1) (*c*). It is important, therefore, to remember that the decision of this case may have a wider application than if it were limited to British ships sailing from the port of Hong Kong. In the course of the argument, however, it was suggested that the above assumption was misconceived, and that the requirement governing the case is paragraph (*b*), which reads as follows: "if the ship is of 100 tons or upwards, with at least "one officer besides the master holding a certificate not lower "than that of only mate, or of second mate in the case of a "sailing ship of not more than 200 tons."

Provisions relating to ships of 100 tons burden were substituted in section 92 of the Merchant Shipping Act, 1894, in somewhat different terms by section 56 of the Merchant Shipping Act, 1906. The precise differences are irrelevant for the present purpose. The point, it was suggested, is that the *Empire Jamaica* being a vessel of over 100 tons burden, and both the master and the first mate being duly certificated, the ship was properly manned with regard to the certification of her officers, and the requirements of paragraph (*c*), therefore, do not arise. Alternatively, it was suggested that even if the requirements of paragraphs (*b*) and (*c*) are not alternative but cumulative, the requirements of paragraph (*c*) do not apply to this case because the *Empire Jamaica* could not be said to carry more than one mate, since, it was suggested, the description of a person as "mate" assumes that he holds a certificate as such, and the ship carried only one officer, namely, the first mate, thus certificated.

As regards the question whether the requirements of paragraphs (*b*) and (*c*) are alternative or cumulative, the very fact that the test in the one case is the ship's burden and in the other case is the number of mates she carries, may suggest that the requirements are not alternative. However that may be, it seems to me to be important to remember that the Merchant Shipping Act, 1894, was a consolidating Act and that section 92 is derived from sections 136 and 291 of the Merchant Shipping Act, 1854, as regards masters and mates, and from section 5 of the Merchant Shipping Act, 1862, as regards engineers. In section 136 of the 1854 Act the requirements depending on the ship's burden and on the number of mates carried, though placed in the opposite order, are coupled by the word "and," which leaves no room for inferring that they are alternative provisions. Likewise, in my opinion, the corresponding provision of the Merchant Shipping Act, 1894, as amended, and of the Ordinance in question, are cumulative.

As to the question whether paragraph (*c*) applies to a ship which in fact carries only one certificated mate, it is important to note that "mate" is not defined in the Merchant Shipping Act, nor, so far as appears in the papers in this appeal, in the Ordinance. Moreover, the words "at least the first and second "mates duly certificated" themselves seem to imply that there may be one or more mates, in addition to the duly certificated first and second mates, who need not be certificated.

With reference to section 4 (1) of the Ordinance, the various grades for which certificates of competency may be granted to masters, mates and engineers are set out in section 93 (1) of the Merchant Shipping Act, 1894, subsection (2) of which reproduces the corresponding provisions of section 137 of the Act of 1854. A certificate of competency for a foreign going ship is deemed to be of a higher grade than the corresponding certificate for a home-trade passenger ship, and the holder of the former certificate may go to sea in the corresponding grade in the last-mentioned ship, but not vice versa. This seems to imply that, merely because he does not qualify for inclusion in the complement of certificated officers in a particular ship, a person is not disentitled to serve in a subordinate capacity as a mate. Moreover, as Willmer J. pointed out,[2] many of the smaller ships plying in the coastal trade carry no certificated persons at all, and are not required to do so. Apart from the fact that there is no definition of the term "mate," the Merchant Shipping Act, 1894, itself is inconclusive. Manifestly sections 469, 470 and 471, dealing with the power of the Minister of Transport and Civil Aviation to suspend or cancel the certificate of any master, mate or engineer, assume that the officer in question is in possession of a certificate. On the other hand, in the case of an application to the High Court under section 472 to remove a master, the application may, by subsection (2), be made, amongst others, by "any certificated mate." By section 138 (1), dealing with the power of a superintendent to require production of ships' papers, he may require, amongst others, "any mate" or other member of the crew to produce any log books or other documents in his possession or power relating to a matter in question in the proceedings; and by sections 222 (1) and 223 (1) in the case of a seaman or apprentice being guilty of the offence of desertion or of absence without leave or otherwise absenting himself from his ship without leave, "any mate," amongst others, may, with or without the assistance of the local police, convey him on board his ship, or, with or without the like assistance, may arrest him.

In these circumstances, I think that it is a legitimate inference that Parliament and the draftsman of the Ordinance used the word "mate" as it is used in common parlance. Ansted's Dictionary of Sea Terms, in the revised edition of 1951, repeats the definition given in the first edition of 1897 in the following words: "Mate (in a ship).—Literally, the master's assistant.

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[2] [1955] P. 52, 58.

"There may be in a merchant vessel as many as four or five "mates; they are officers under the captain. In the Royal Navy "there are various mates who are petty officers." In the Oxford English Dictionary "mate" is defined, so far as is relevant, as follows: "4. Nautical uses. (*a*) An officer (now only on a "merchant vessel) who sees to the execution of the commands "of the master or commander, or of his immediate superior, "and in the absence of the master takes command of the ship. "In the Royal Navy the title has been changed to sub-lieutenant; "and in the merchant-service, mates hold functions not greatly "inferior to those of lieutenants in the Royal Navy. Formerly "called *master's mate* (see Master)."

In my opinion, Willmer J. was fully justified in finding as a fact that Mr. Sinon, though signed on as "senior boatswain," was treated as acting second officer in a ship which, de facto, carried three mates; and in finding that, although he and the third officer, unlike the first officer, were uncertificated, the ship carried these three men to perform the duties of mates, and that they were employed and paid as such. It follows, in my opinion, that he was right in holding that section 4 (3) (*c*) was violated and that it was violated with the privity of the respondents.

I dissent, with respect, from Jenkins L.J.'s description[3] of this as a "technical breach" of the regulations. This requirement of the Merchant Shipping Act and of the Ordinance in question is, in my opinion, a safety regulation designed to secure the lives of passengers and mariners, and, incidentally, the safety of cargo and of other shipping, and has no less force than, for example, the collision regulations governing lights to be exhibited by ships (cf. *The Truculent*[4]). Further, I should deprecate any encouragement of the idea that it is open to owners at their own instance to substitute for the prescribed complement of certificated officers some lesser complement which they choose to consider as sufficient. In this case, however, it must be remembered that there is an important distinction between the Merchant Shipping Act and the Ordinance inasmuch as no dispensing power is provided under the Act comparable with that given by the Emergency Regulations of 1951 (subsection (19A)) as regards Hong Kong. It may be doubtful (see Arnould on Marine Insurance, 13th ed., vol. 2, section 722, and Maclachlan on Merchant Shipping, 7th ed., p. 148) whether breach of the regulation is of itself sufficient to render unseaworthy a ship putting to sea insufficiently manned with the prescribed complement of certificated officers. However that may be, I am of opinion that Willmer J. directed himself correctly in posing the question whether the respondents had satisfied him that the breach on their part of the Hong Kong Ordinance had no causal connexion with the collision.

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[3] [1955] P. 259, 270; [1955] 3 All E.R. 60.

[4] [1952] P. 1; [1951] 2 T.L.R. 895; [1951] 2 All E.R. 968.

In his judgment the Master of the Rolls says[5] that the respondents have to prove that the damage or occurrence took place without their actual fault or privity; but that, in his judgment, they can establish that fact if they prove to the satisfaction of the court that, in all the circumstances of the case, they had good reason to believe that the man they did engage in the capacity nominally of chief boatswain, but actually and in practice as second mate, was fully competent to perform the functions which would fall upon him to perform. He held that Willmer J. had concluded that the respondents had, as a matter of fact, established that case to his satisfaction, and the Master of the Rolls held that there was no sufficient ground for disturbing that finding of fact. The other members of the Court of Appeal have come to the same conclusion. Thus, your Lordships are presented with concurrent findings of fact, from which, for my part, I see no reason to differ.

I think that this conclusion can be tested by analogy to the terms of the Emergency Regulations of 1951 (subsection (19A)), bearing in mind, of course, that the dispensing power thereunder had not been invoked at the material time. In my opinion, the effect of the judgments below is that in the circumstances of the case, namely, the recognized shortage of certificated officers, and the practice of the Marine Department of Hong Kong, it has been established that the requirement of section 4 (3) (*c*) of the Ordinance had been substantially complied with, or at least that the provision made by the employment of Mr. Sinon as second mate had been proved to be as effective as actual compliance with the requirement that the second mate should be duly certificated.

For these reasons I agree with my Lord that this appeal be dismissed.

LORD GODDARD. My Lords, I have had an opportunity of reading the opinion of my noble and learned friend, Lord Morton of Henryton, with which I am in complete agreement and to which I do not think I can usefully add anything. I agree that this appeal should be dismissed.

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[5] [1955] P. 259, 267–268.

Lord Cohen. My Lords, the question for determination in these proceedings is whether the respondents are entitled under section 503 of the Merchant Shipping Act, 1894, to limit their liability for the damage occasioned by a collision which occurred in the Java Sea on September 1, 1951, between their ship, then known as the *Empire Jamaica*, and the appellants' ship *Garoet*, on the ground that the collision occurred without their actual fault or privity. Both Willmer J. and the Court of Appeal have answered this question in favour of the respondents.

The respondents admit that the collision was entirely due to the fault of one Henry Sinon, who had been signed on as chief boatswain of the *Empire Jamaica* and was at the time of the collision acting as second mate.

The ship's articles of the *Empire Jamaica* for the voyage in question were opened in Hong Kong on July 3, 1951. At that time the relevant Hong Kong Ordinances and Regulations were the Merchant Shipping (Amendment) Ordinance, 1949, and the Emergency (Merchant Shipping Ordinance, 1899) (Amendment) Regulations, 1951.

Section 4 of the Ordinance of 1949, so far as material, provides as follows: "(1) The name of a master, first, only, or second "mate, or first or second engineer shall not be attached to the "register or articles of agreement of any British ship, unless such "master, mate, or engineer possesses a certificate of service or "competency granted in the United Kingdom under the Merchant "Shipping Acts, or a colonial certificate of competency declared "by any Order of His Majesty in Council to be of the same "force as if it had been granted under the said Acts. . . . "(3) Every British ship, and every foreign ship holding a "passenger certificate under section 10 shall, when leaving any "port of the Colony, be provided with officers who possess "certificates of competency of a grade appropriate to their "stations in the ship or of a higher grade, according to the "following scale:—(*a*) in any case, with a duly certificated "master; (*b*) if the ship is of 100 tons or upwards, with at least "one officer besides the master holding a certificate not lower "than that of only mate, or of second mate in the case of a "sailing ship of not more than 200 tons; (*c*) if the ship carries "more than one mate, with at least the first and second mates "duly certificated; . . ."

Subsection (19A), added by the 1951 regulations, enables the Governor in Council to exempt any ship from any of the above provisions subject to his being satisfied on certain points. No application for exemption under this provision had been made in respect of the *Empire Jamaica* before the collision occurred.

The articles, opened on July 3, 1951, show that the *Empire Jamaica* had signed on a certificated master (Laurence Nelson Beer), a certificated first officer, Mr. Sinon as chief boatswain, and a third officer. Neither Mr. Sinon nor the third officer signed as mates, but the trial judge has found that the ship carried them to perform the duties of mates. He therefore held that section 4 (3) (*c*) of the Ordinance had been violated. It was not argued before him or before the Court of Appeal that that subsection had no application, since neither Mr. Sinon nor the third officer signed on as mates. That point was taken before us, but I do not find it necessary to construe the difficult language of section 4 (3) (*c*), since I am satisfied that even if that subsection was violated, the breach neither caused nor contributed to the collision.

I agree with the Master of the Rolls that the respondents will have discharged the onus of proving that the damage resulting from the collision occurred without their actual fault or privity if they prove that in all the circumstances of the case they had good reason to believe that Sinon was fully competent to perform the functions which would fall upon him when acting as second mate.

I will not weary your Lordships by reviewing in detail the evidence which was before the trial judge. Suffice it to say that, in my opinion, the oral evidence of Captain Beer and paragraph 6 of the affidavit of Mr. Leung Yew, sworn on December 2, 1954, establishing as they do that Captain Beer had complete confidence in Sinon based on about eight years' experience of him, and that Mr. Leung Yew sanctioned his employment in the faith, amongst other things, of Captain Beer's recommendation, amply justify the conclusion of the trial judge and of the Court of Appeal that the respondents had discharged the onus which rested upon them.

I am fortified in the conclusion that the failure to provide a certificated second mate was not a contributing cause of the collision by the affidavit of Mr. James Jolly, the Director of Marine of Hong Kong. As I read his affidavit, apart altogether from the question of exemption under subsection (19A) added by the amending regulation, owing to the shortage of British certificated officers in Hong Kong it was the general practice of his department to sign on uncertificated men described in the articles as "boatswain" or "chief boatswain" or as "mate," and not to require owners to comply with section 4 (3) (*c*) but only with section 4 (3) (*b*). The articles of the *Empire Jamaica* conformed to this practice, and in these circumstances I do not think it can be said that the fact that Sinon was not certificated was a contributory cause of the collision.

For these reasons I would dismiss the appeal.

LORD KEITH OF AVONHOLM. My Lords, I have had the advantage of reading the speech of my noble and learned friend on the Woolsack in which I concur.

Appeal dismissed.

Solicitors: *Waltons & Co.; Hill, Dickinson & Co.*

F. C.

[HOUSE OF LORDS.]

WEST SUFFOLK COUNTY COUNCIL . . APPELLANTS;

AND

W. ROUGHT LTD. . . . . RESPONDENTS.

H. L. (E.)*
1956
June 18, 19;
July 25.

Compulsory Purchase — Compensation — Loss of profits—Hypothetical income tax deductible from compensation — Acquisition of Land (Assessment of Compensation) Act, 1919 (9 *&* 10 *Geo.* 5, *c.* 57), *s.* 2, *r.* (6).

A local authority compulsorily acquired leasehold factory premises leased to and occupied by a company for manufacture. Nine months elapsed between the date when the local authority took possession and the date when the company was able to re-commence its operations in alternative accommodation. It claimed compensation under the Acquisition of Land (Assessment of Compensation) Act, 1919, for (inter alia) loss of profit in respect of specific orders during the interruption:—

Held, that the Lands Tribunal assessing the compensation (in respect of which the company would not be liable to income tax) should have estimated to the best of their ability the amount of additional taxation which the company would have had to bear if it had actually earned the amount which the interruption prevented it from earning and should have reduced the award by that amount.

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* *Present*: LORD MORTON OF HENRYTON, LORD GODDARD, LORD MACDERMOTT, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

British Transport Commission v. *Gourley* [1956] A.C. 185; [1955] 3 All E.R. 796 applied.

Decision of the Court of Appeal [1955] 2 Q.B. 338; [1955] 2 All E.R. 337 reversed.

Appeal from the Court of Appeal (Evershed M.R., Hodson and Parker L.JJ.).

This was an appeal by the West Suffolk County Council, the appellants, from an order of the Court of Appeal made on April 27, 1955, whereby it was ordered that the decision of the Lands Tribunal dated June 29, 1954, awarding compensation payable to W. Rought Ltd., the respondents, for the compulsory acquisition of premises, part of a factory known as "The "Maltings," at Brandon, in Suffolk, and fixing the sum for temporary interruption of manufacturing operations at £11,600, be affirmed and that the appeal of the appellants be dismissed with costs. The appeal arose out of a case stated by the Lands Tribunal.

The facts, stated by Lord Morton of Henryton, were as follows: The appellants were engaged, in and after the month of October, 1952, on a scheme for widening and rebuilding a bridge over the Little Ouse River and widening the High Street at Brandon in the County of Suffolk. The respondents were leaseholders and in possession of a factory in close proximity to the bridge known as "The Maltings," having the benefit of a lease of the premises for 21 years from October 11, 1944, with an option to renew for a further 21 years. As a necessary part of the bridge and road widening scheme the appellants, in exercise of their statutory powers, served upon the respondents a compulsory purchase order comprising a substantial part of the respondents' premises. The respondents at all material times carried on business as hatters' furriers. This business involved the preparation of rabbit fur which formed the raw material of fur felt used in the manufacture of hats, and the respondents used the premises in question for the storage of skins and for the process known as "blowing fur." The compulsory purchase order was confirmed by the Minister of Transport on June 9, 1951, and the appellants took possession of the premises on October 6, 1952. As a result of the acquisition by the appellants the respondents had to find other premises suitable for the purposes already mentioned. This they succeeded in doing shortly after the appellants took possession, but they found themselves unable to recommence blowing operations, in the new premises, until midsummer, 1953. Consequently, during the period of nine months from October, 1952, to midsummer, 1953, the respondents were deprived of the premises acquired by the appellants and had no other premises to take their place.

Following upon the confirmation of the compulsory purchase order by the Minister of Transport, a notice to treat was served on the respondents by the appellants on August 25, 1951. On February 29, 1952, a claim for compensation for £50,000 was submitted to the appellants by the respondents. This was followed, on May 1, 1953, by a revised claim for £49,838. As the respondents and the Inland Revenue district valuer were unable to agree on a figure, the question of compensation was referred to the Lands Tribunal. The claim was further revised on the opening day of the hearing before the tribunal and the figures as laid before the tribunal were as follows:

	Claimant	*District Valuer*
	£	£
(1) Value of the leasehold interest in the land taken	2,280	530
(2) Injurious affection of land not taken	360	150
(3) Disturbance—		
(A) Permanent	22,760	10,500
(B) Temporary	20,716	2,100
(4) Cost of removal	624	610
(5) Architects' and Quantity Surveyors' fees	1,028	Nil
	£47,768	£13,890

The present appeal was concerned only with the sum claimed under heading (3) (B). The respondents' formulation of their claim under that head was as follows:

"LOSS ON CONTRACTS.

"The claimants have lost contracts for reasons directly "caused by the forced removal from Brandon. The estimated "extent of such loss is revealed by correspondence, the details "of the claims being:—

H. L. (E.)
1956
WEST SUFFOLK COUNTY COUNCIL
v.
W. ROUGHT LTD.

"Joseph Wilson & Sons Ltd., Denton, Manchester.
"Loss of order for 25,000 lbs.
"Blown Coney No. 1—
"Estimated loss: 25,000 ×
"5s. 6d. ... ... = £6,875
"Cia. Prada Industria e Commercio,
"Sao Paulo, Brazil.
"Loss of order for 10/20,000 Kilos
"Blown Coney No. 1—
"Estimated loss on say 10,000
"Kilos, say 22,000 lbs. ×
"6s. 1d. ... ... = £6,691
"Chapeus Vicent Cury SA: Campinas,
"Brazil.
"Loss of order for 20,000 Kilos
"Blown BCB Unpulled—
"44,000 lbs. × 3s. 3d. ... = £7,150

£20,716"

The tribunal's decision on this claim was as follows:

"It is not strictly correct to call the items in this claim "'lost contracts,' they were inquiries which did not go as far in "the Brazilian cases as a discussion of price. I decided that "in the case of the Wilson inquiry the claimants would have "obtained the order and I found that in this case they were "entitled to full compensation, but I did not accept the suggested "loss of profit of 5s. 6d. a lb. On the evidence of the accountants "and an examination of the figures in the company's accounts I "decided that a loss of 4s. a lb. was the proper amount and I "therefore assessed the claimant company's loss on this to be "£5,000.

"I found that the Brazilian inquiries were by no means so "surely to be reckoned on but I was satisfied that if the claimant "company had been undisturbed there was a very good chance "that the orders would have come their way. So I put the "66,000 lbs. claimed on these items at 2s. a lb., which gave a "figure of £6,600, making a total in this item of £11,600."

In making his valuation under item 3 (B) the district valuer deducted a sum representing the income tax which he suggested would have been paid by the claimants if they had in fact earned this profit. He did this apparently under the instruction of the Board of Inland Revenue, the following letter being put in as part of his evidence:

"Block D,
"Brooklands Avenue,
"Cambridge.
"February 16, 1954.

"Dear Sirs,

"West Suffolk County Council
"The Maltings, Brandon Suffolk—Messrs. W. Rought Ltd.
"Reconstruction of Brandon Bridge

"With reference to the subject of income tax and the question "of it being taken into account in compensation for temporary "trade disturbance, you are probably aware that it has been held "in the House of Lords (*Inland Revenue Commissioners* v. "*Glasgow & South-Western Railway Co.*[1]) that in the case of "compulsory acquisition of land under the Lands Clauses Con"solidation (Scotland) Act, 1845, the sum allowed by the jury "as compensation for loss of business was part of the 'considera"'tion for the sale' of the premises.

"As a result of this decision the Board of Inland Revenue do "not regard the compensation in a case of this kind in respect "of temporary loss of profits, as liable to taxation for income tax "purposes. That being so, and as it is the claimants' real loss "which is to be compensated, it will be contended on behalf of "the acquiring authority that over-payment would result unless "the claimants' non-liability for income tax were taken into "account when assessing the amount of compensation payable "in respect of temporary loss of profits of a continuing business. "The object is to ensure that in the net result the claimants "would be no better off than if they had not suffered temporary "disturbance.

"I am directed by the Board of Inland Revenue to give your "clients an assurance, if this view should be accepted by the "tribunal, that the claimants will not be liable to income tax on "the compensation for temporary disturbance.

"As this letter and the assurance which it contains will be "referred to before the Lands Tribunal, I shall be glad if you will "kindly acknowledge its receipt for the purpose of the hearing.

"Yours faithfully,
"(Signed) A. R. BARTON,
"District Valuer.

"Messrs. Gerald Eve & Co.,
"6 Queen Street,
"Mayfair,
"London, W.1."

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[1] (1887) 12 App.Cas. 315.

The Lands Tribunal dealt with the deduction for which the district valuer contended as follows: "I decided that this was "not a deduction which I should make, and I made no decision "on the subject of liability to tax by either party before me." The tribunal concluded: "The question for the decision of the "Court of Appeal is whether in so deciding I came to a correct "determination in point of law."

The Court of Appeal delivered judgment on April 27, 1955, affirming the decision of the Lands Tribunal. The court found no valid ground for distinguishing the present case from the case of *Billingham* v. *Hughes*.[2]

Geoffrey Lawrence Q.C. and *Duncan Ranking* for the appellants. The incidence of taxation should have been taken into account. The Court of Appeal based their decision on *Billingham* v. *Hughes*,[2] but since then that case has been overruled by *British Transport Commission* v. *Gourley*.[3] Now the question arises whether the principle in the latter case should be applied to such a case as the present in respect of the element of loss of trading profit. The appellants submit that it should.

The assessment of compensation here is governed by section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919. Before 1919 there were in the assessment of compensation the elements of (a) the value of the land to the owner, and (b) a sum in respect of severance and injurious affection to lands held with the acquired lands. Compensation was not awarded for disturbance, though this element might be taken into account in computing the value of the land to the owner. Disturbance embraces the cost of removal to new premises and loss on a forced sale of the fittings and fixtures of a business, elements which reflect the value of the land to the owner. By section 2, rule (1), of the Act of 1919 the position of giving the owner a bonus was ended and there was established the criterion of the value of the land in the open market as between a willing seller and a willing buyer. The object of rule (6) was to preserve, duly recognized, the element of compensation for disturbance. As to the assessment of compensation for loss of business, see *Inland Revenue Commissioners* v. *Glasgow & South-Western Railway Co.*[4] The Act of 1919, by section 2, rule (2), converted the unwilling seller into a willing seller.

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[2] [1949] 1 K.B. 643; 65 T.L.R. 246; [1949] 1 All E.R. 684.

[3] [1956] A.C. 185; [1956] 3 All E.R. 796.

[4] 12 App.Cas. 316, 320, 321.

Unless the element of taxation, which is inseparable from earning, is here taken into account, the principle of compensation would be vitiated. As to the principles on which compensation is payable, see *In re an Arbitration between Lucas and the Chesterfield Gas and Water Board* [5] and *Horn* v. *Sunderland Corporation*,[6] which indicate that a man, in receiving compensation, must get neither more nor less than he has lost; he must not make a profit. *Comyn* v. *Attorney-General* [7] confuses the ends with the means, because the judge was ultimately valuing a capital asset. If the problem is the valuation of loss of profits by a company still continuing in business, the considerations to be applied are still the same. What should be paid in compensation is the true loss, taking into account the incidence of tax liability. If the company on balance would have made a loss in the relevant year in any event, income tax would not be deducted from the amount of the earnings.

Suppose two factories side by side each with a similar contract to execute. Before the contracts can be performed, one factory is burnt out as the result of a tort and the other is compulsorily acquired by the local authority. The owners of the first factory bring an action and the owners of the second claim compensation. As a result of *British Transport Commission* v. *Gourley* [8] the tax incidence would have to be taken into account in assessing the damages for loss of earnings in the first case. The opposite effect should not be produced in the case of the other factory.

Loss of profits by reason of expulsion from premises depends on the profits being earnable although not earned. As income they would have been subject to the incidence of taxation. Unless the tax incidence is taken into account here, the basic principle of equivalents will be infringed.

Gilbert Paull Q.C. and *Michael Chavasse* for the respondents. *British Transport Commission* v. *Gourley* [9] is to be distinguished: see the doubt expressed by Earl Jowitt.

Before the Act of 1919 compensation for disturbance was governed by section 63 of the Lands Clauses Consolidation Act, 1845. Disturbance is not expressly mentioned there, but it has always been held that compensation under the Act should cover disturbance in appropriate cases: see *Horn* v. *Sunderland Corporation*.[10] Compensation for disturbance must be calculated on the basis that the owner is an unwilling seller and such an one would require compensation for each transaction lost in consequence of the disturbance, irrespective of whether the year's trading would result in a profit or a loss.

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[5] [1908] 1 K.B. 571; 24 T.L.R. 858.

[6] [1941] 2 K.B. 26; 57 T.L.R. 404; [1941] 1 All E.R. 480.

[7] [1950] I.R. 142.

[8] [1956] A.C. 185.

[9] Ibid. 202.

[10] [1941] 2 K.B. 26.

If this compensation is truly the price of the land the same principle should apply to rule (6) of section 2 of the Act of 1919 as to rule (2) and the court will not ask what the recipient will do with the money once it is received. The compensation received is the price of a capital asset, and it must be looked at objectively from the point of view of the land, the sum received under rule (6) being really only part of the value of the land. Price and compensation are the same thing under different names: see *Inland Revenue Commissioners* v. *Glasgow & South-Western Railway Co.*[11]

If that is wrong, and compensation under rule (6) must be treated as being under a separate head and subject to different principles from compensation under rule (2), then the sum received by the respondent company would have to go into its revenue account, and if, at the end of the year, it was found that profits had resulted, that sum would have to be taken into consideration in calculating the tax to be paid.

There was never a case in which the income tax authorities made a claim for tax in respect of damages for tort. But here one is in the realm of contract and not of tort. If the compensation for disturbance is separate from the rest the recipient will have to split up the lump sum and the compensation now in question, being just compensation for loss of business, will have to go into the profit and loss account and may be liable to tax.

A decision against the respondent company would completely reverse the practice among valuers and compel them to consider a type of matter with which they are not accustomed to deal.

As to liability to tax in respect of compensation, see *Kelsall Parsons & Co.* v. *Inland Revenue Commissioners*,[12] *Wiseburgh* v. *Domville*[13] and *Tilley* v. *Wales.*[14]

Geoffrey Lawrence Q.C. in reply. Under the Act of 1845 there were only two heads under which the right to compensation arose: (1) the value of the land to the owner, and (2) severance of the land and injurious affection to other lands held with the land acquired. Disturbance could only be an element under the first heading.

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[11] 12 App.Cas. 316, 321.

[12] 1938 S.C. 238; 21 T.C. 608.

[13] [1955] 1 W.L.R. 1287; [1955] 3 All E.R. 548.

[14] [1943] A.C. 386; 59 T.L.R. 178; [1943] 1 All E.R. 280.

The person compensated must get neither more nor less than the value of the land to him. It is a question here of valuing some element in the land as being of value to the landlord. One must estimate what he would lose by the disturbance: see *Inland Revenue Commissioners* v. *Glasgow & South-Western Railway Co.*[15]

No part of the compensation is taxable. *Rex* v. *B. C. Fir and Cedar Lumber Co. Ltd.*[16] shows how far away from the present case are considerations of whether the payment is income or capital.

To allow this appeal would be the only decision consistent with *British Transport Commission* v. *Gourley.*[17]

Their Lordships took time for consideration.

LORD MORTON OF HENRYTON stated the facts and continued: My Lords, the Acquisition of Land (Assessment of Compensation) Act, 1919, by section 2, rules (2) and (6), provides as follows:

Rule (2) (so far as material): "The value of land shall, subject "as hereinafter provided, be taken to be the amount which the "land if sold in the open market by a willing seller might be "expected to realize. . . ."

Rule (6) enacts: "The provisions of rule (2) shall not affect "the assessment of compensation for disturbance or any other "matter not directly based on the value of land."

Prior to the Acquisition of Land (Assessment of Compensation) Act, 1919, compensation for disturbance was governed by the Lands Clauses Consolidation Act, 1845, s. 63, which enacts (so far as material): "In estimating the purchase money or "compensation . . . regard shall be had . . . not only to the "value of the land to be purchased . . . but also to the damage, "if any, to be sustained by the owner of the lands by reason of "the severing of the lands taken from the other lands of such "owner, or otherwise injuriously affecting such other lands . . ."

While disturbance is not expressly mentioned in section 63, it has always been held (and there is no dispute as to this in this case) that compensation under the Lands Clauses Consolidation Act should include in appropriate cases compensation for disturbance.

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[15] 12 App.Cas. 316, 322–323, 325–326.

[16] [1932] A.C. 441; 48 T.L.R. 284.

[17] [1956] A.C. 185.

[His Lordship stated the facts relating to the respondents' claim and continued:] My Lords, the question whether any sum awarded to the respondents under heading 3 (B) is or is not liable to income tax is not before the House, but I see no reason to doubt that the view of the Board of Inland Revenue, as expressed in the letter of February 16, 1954, was correct, and I have formed the opinion which I am about to express upon the footing that this is so.

On December 8, 1955, your Lordships' House gave judgment in *British Transport Commission* v. *Gourley*.[1] In that case the respondent Gourley was gravely and permanently injured in a railway accident, for which the Transport Commission was liable by reason of the negligence of its servants. Pearce J. awarded £37,720 damages in respect of loss of earnings, actual and prospective, and in arriving at that sum he had no regard to the fact that, had the respondent earned such a sum, he would have had to pay income tax and surtax in respect of it. The judge, at the request of the appellants, made an alternative assessment of £6,695, representing the sum which he would have awarded if he had taken that hypothetical tax liability into account. This House, overruling *Billingham* v. *Hughes*,[2] held that the smaller sum should be awarded under this head, and Earl Jowitt observed[3]: "The broad general principle which should govern the "assessment of damages in cases such as this is that the tribunal "should award the injured party such a sum of money as will "put him in the same position as he would have been in if he "had not sustained the injuries: see *per* Lord Blackburn in "*Livingstone* v. *Rawyards Coal Co.*[4]" After referring to certain cases, including the decision of Lord Sorn in *M'Daid* v. *Clyde Navigation Trustees*,[5] the noble earl continued[6]: "My Lords, "I agree with Lord Sorn in thinking that to ignore the tax "element at the present day would be to act in a manner which "is out of touch with reality. Nor can I regard the tax element "as so remote that it should be disregarded in assessing damages. "The obligation to pay tax—save for those in possession of "exiguous incomes—is almost universal in its application. That "obligation is ever present in the minds of those who are called "upon to pay taxes, and no sensible person any longer regards "the net earnings from his trade or profession as the equivalent

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[1] [1956] A.C. 185; [1955] 3 All E.R. 796.
[2] [1949] 1 K.B. 643.
[3] [1956] A.C. 185, 197.
[4] (1880) 5 App.Cas. 25, 39.
[5] 1946 S.C. 462.
[6] [1956] A.C. 185, 203.

"of his available income. Indeed, save for the fact that in "many cases—though by no means in all cases—the tax only "becomes payable after the money has been received, there is, "I think, no element of remoteness or uncertainty about its "incidence."

Lord Goddard (with whose opinion Lord Radcliffe and Lord Somervell of Harrow agreed) observed [7]: "The basic principle "so far as loss of earnings and out-of-pocket expenses are concerned is that the injured person should be placed in the same "financial position, so far as can be done by an award of money, "as he would have been had the accident not happened. . . ."

My Lords, it seems to me that the reasoning which led this House to its decision in *Gourley's* case [8] is equally applicable to the present case. In *Gourley's* case [8] the House had to decide what was the actual monetary loss suffered by the injured man by being deprived of earnings which he would have made if he had not been injured. In the present case the House has to decide under heading 3 (B) what was the actual monetary loss suffered by the respondents by being deprived of profits which they would have made in the period of nine months already mentioned. I can see no reason why, if the incidence of taxation was a relevant factor in *Gourley's* case,[8] it is not also a relevant factor in the present case. The result is that the Lands Tribunal should have estimated, to the best of his ability, the amount of additional taxation which the respondents would have had to bear if they had actually earned, during the period of nine months already mentioned, the sum of £11,600 awarded to them under heading 3 (B), and should have reduced the award by that amount.

In some cases it may be a matter of considerable difficulty to estimate the sum which ought to be awarded by way of compensation for disturbance, if the incidence of taxation is to be taken into account, but I do not think that any great difficulty arises in the present case. It is for the respondents to prove the loss which they have suffered. Their trading year ends on August 31. They have proved to the satisfaction of the tribunal that they have lost £11,600 profits which they would have made during the trading year ending August 31, 1953, but it is still incumbent upon them to prove their loss after taking into account the incidence of taxation. This they could do by submitting to the tribunal (a) a statement of the tax liability which they actually incurred in respect of their trading during the year in

[7] [1956] A.C. 185, 206.

[8] [1956] A.C. 185.

question, and (b) an estimate of the tax liability which they would have incurred in respect of their trading during the same year if they had made this profit of £11,600. These figures would, of course, be open to criticism by the appellants. When the tribunal had decided what are the right figures under (a) and (b) the net loss to the respondents by disturbance would be £11,600 less the amount by which (b) exceeds (a). In saying this I am not attempting to lay down any general rule as to how the relevant figure is to be ascertained; nor do I say that the procedure which I have outlined is the only possible procedure in the present case.

Mr. Lawrence, for the appellants, mentioned the case of *Comyn* v. *Attorney-General*,[9] but did not base any part of his argument upon that case. *Comyn's* case[9] was cited to this House in *Gourley's* case,[10] and Earl Jowitt observed[11]: "This "was a case in which the question arose as to the compensation "for compulsory acquisition of property. It was therefore neces-"sary for the court to determine the fair valuation of a capital "asset. In such a case I should have thought it questionable "whether a reduction of the amount to be paid as compensation "for that capital asset based on the prospective tax liability of "its owner was in accordance with the true principle of valua-"tion." He then referred to the decision of the Court of Appeal in the present case and continued: "The facts in *Rought's* "case[12] were widely different from those in the present case and "it is not necessary for the present purpose to express any final "opinion on either *Rought's* case[12] or *Comyn's* case.[13]"

My Lords, I respectfully adopt Earl Jowitt's comment upon *Comyn's* case,[13] and I too take the view that it is not necessary to express any final opinion upon that case. The present case is clearly distinguishable from it; although the sum to be awarded under heading 3 (B) forms part of the total consideration to be paid to the respondents on the acquisition of their property, the estimation of that sum does not involve a valuation of a capital asset but a computation of a temporary loss of profits by a company which remained in business. The tribunal, rightly in my view, dealt with the "value of the leasehold interest in the "land taken" under a separate sub-head.

I would allow the appeal and answer in the negative the question asked by the case stated. The case should be remitted to the Lands Tribunal to reconsider the amount of compensation awarded under heading 3 (B) on the basis that the tribunal should not have excluded the element of liability to tax.

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[9] [1950] I.R. 142.
[10] [1956] A.C. 185, 190.
[11] Ibid. 202.
[12] [1955] 2 Q.B. 338; [1955] 2 All E.R. 337.
[13] [1950] I.R. 142.

The respondents must pay the appellants' costs here and in the Court of Appeal.

My Lords, my noble and learned friend, Lord MacDermott, who is unable to be present today, asks me to say that he agrees with the conclusions I have stated, and the reasons on which they are based.

LORD GODDARD. My Lords, the only question which falls for decision in this appeal is whether, where loss of profits is claimed in respect of disturbance due to the compulsory acquisition of business premises, the compensation should be assessed without taking into account the fact that the profits, if earned, would have been subject to tax. The Lands Tribunal decided that no deduction should be made on the estimated profits on this account and this decision was affirmed by the Court of Appeal. Subsequently, however, the question came before this House concerning the amount of damages recoverable for loss of prospective earnings occasioned by personal injuries due to negligence, and this House held that, in calculating those damages, account must be taken of the fact that the injured person who would have earned them would have been under a liability to pay income tax upon them when earned. It was held that compensation must be based on an estimate of the earnings after deduction of tax: *British Transport Commission* v. *Gourley*.[14] I am unable to find any principle upon which that case can be distinguished from the present. The amount to be deducted cannot be calculated with any degree of certainty as it involves a forecast not only as to the amount which would be earned but also as to the future rate of tax and kindred considerations, but the opinions delivered in *Gourley's* case [14] indicate how the tribunal of fact should approach this question; and, in my opinion, the case should go back to the Lands Tribunal with a direction to consider the amount to be awarded under this head in the light of the decision of this House in that case.

I agree that this appeal should be allowed.

LORD KEITH OF AVONHOLM. My Lords, I agree with your Lordships that the question in this appeal is ruled by the decision of this House in the case of *Gourley*.[14] One of the elements taken account of in fixing the compensation for, or purchase price of, the property compulsorily acquired was loss of profits for disturbance. In assessing the loss under this head liability to tax cannot, in my opinion, be ignored merely because the amount of the loss goes to make up the total compensation or purchase price to be fixed for the acquisition of a capital asset. I reserve entirely my opinion on how far the ratio of *Gourley's* case[14] can be applied to assessing the value of land.

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[14] [1956] A.C. 185.

LORD SOMERVELL OF HARROW. My Lords, for the reasons which have been stated by my noble and learned friend on the Woolsack, I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for A. F. Skinner, Bury St. Edmunds; E. P. Rugg & Co.*

F. C.

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[14] [1956] A.C. 185.

[HOUSE OF LORDS.]

H. L. (E.)*
1956
July 17, 18;
Oct. 31.

WHEELER . . . . APPELLANT;

AND

MERCER . . . . RESPONDENT.

Landlord and Tenant — Act of 1954 — *Business premises (Security of tenure)—Tenancy at will—Quarterly tenancy—Claim for new lease or compensation — Tenant holding over during negotiations — Tenancy at will—No statutory protection—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 23, 24, 25, 43, 69.
Landlord and Tenant—Tenancy at will.

A tenant of shop premises, whose quarterly tenancy had been ended by notice to quit expiring on September 29, 1953, and who, before that date, had begun proceedings under the Landlord and Tenant Act, 1927, for a new lease or compensation, held over pending the conclusion of negotiations. These continued inconclusively until April, 1955, when the landlord took out a county court summons claiming immediate possession:—

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD COHEN, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

Held, that the landlord was entitled to possession since, as a tenant at will by implication of law, the tenant was not entitled to protection under the Landlord and Tenant Act, 1954 (which replaced the Act of 1927).

Section 25 (inter alia) of the Act showed that the definition of "tenancy" in section 69 as a tenancy created "by a tenancy "agreement" was not intended to include a tenancy at will.

Per Viscount Simonds. I do not exclude the possibility of the relation of tenant at will expressly created by a contract being a "tenancy agreement"; the context of the Act shows it does not cover a tenancy at will arising by implication of law.

Morgan v. *William Harrison Ltd.* [1907] 2 Ch. 137 considered.

Per Viscount Simonds, Lord Cohen, Lord Keith of Avonholm and Lord Somervell of Harrow. The tenant holding over was a tenant at will by implication of law, since the holding over was with the landlord's consent.

Per Lord Morton of Henryton, dubitante. The tenant may have been a tenant at sufferance if the landlord merely passively refrained from taking active steps to recover possession.

Decision of the Court of Appeal [1956] 1 Q.B. 274; [1955] 3 All E.R. 455 reversed.

APPEAL from the Court of Appeal (Denning, Hodson and Morris L.JJ.).

This was an appeal by the appellant, Alfred Morris Wheeler (the plaintiff below) from an order of the Court of Appeal dated October 24, 1955. By that order the court affirmed a judgment of Judge Glazebrook on the trial of the action dated July 28, 1955, whereby he dismissed the appellant's claim in the action and directed that judgment be entered for the respondent, Helen Molly Mercer (the defendant below) with costs on Scale 3. By that order the court further ordered that the appellant pay to the respondent her costs of the appeal to the Court of Appeal by a further order dated October 31, 1955; the court dismissed with costs the appellant's application for leave to present a petition of appeal to the House of Lords. On December 19, 1955, leave to lodge a petition to the House of Lords was granted to the appellant pursuant to section 1 (1) of the Administration of Justice (Appeals) Act, 1934, on terms (1) that the appellant undertook not to ask for an order for costs against the respondent if his appeal was allowed, and (2) that the orders as to costs in the county court and in the Court of Appeal should stand in any event.

The appellant was the owner in fee simple of premises at No. 59, Grosvenor Road, Tunbridge Wells, Kent. From 1936 the respondent was in occupation of shop premises on the ground floor, carrying on there the business of a tobacconist. Originally she held as joint or sole lessee under a lease which ended on September 6, 1943, and thereafter she became a quarterly tenant. This tenancy was determined by a notice to quit which expired on September 29, 1953. On receiving this notice, she gave notice under the Landlord and Tenant Act, 1927, claiming a new lease on the ground that goodwill had become attached to the premises, or, alternatively, £3,000 compensation. She remained in possession of the premises. There were proceedings on her claim in the Tunbridge Wells County Court, but they never came to a hearing, because in October, 1953, the matter was adjourned to enable the parties to continue negotiations which had been begun before the notice to quit. On April 6, 1955, the appellant's solicitors wrote to the respondent asking that she should vacate the premises immediately. On April 7, 1955, the appellant took out a summons for possession in the county court, claiming also mesne profits from September 29, 1953, to May 12, 1955. The respondent, besides setting up divers defences not now material, pleaded that she was and had been since September 30, 1953, a tenant at will. The case came on for hearing on June 28, 1955, when counsel for the respondent submitted that, as a tenant at will, she was entitled to the protection of the Landlord and Tenant Act, 1954, which had come into force on October 1, 1954, and repealed the relevant provisions of the Act of 1927. This submission was upheld by the judge in a considered judgment delivered on July 28, 1955. He dismissed the claim for possession and adjourned the claim for mesne profits.

Harold Brown Q.C. and *Michael Parker* for the appellant. The respondent is not a tenant at will, but a tenant at sufferance, and, even if she were a tenant at will, she would not be within the protection of the Landlord and Tenant Act, 1954, the provisions of which are quite inappropriate to a tenancy at will. The relevant provisions of the Landlord and Tenant Act, 1927, are sections 4 (1) and 17 (1). The relevant provisions of the Act of 1954 are section 45 (repealing certain provisions of the Act of 1927), section 70 (2) (laying down the date of its coming into operation), Schedule VII (enumerating the enactments repealed), Schedule IX, paragraph 8 (dealing with pending proceedings), and in particular in Part II of the Act, sections 23 (1), 24 (1), 25 (1) (2) (3) and (4), 26, 30, 33, 34, 35, 43 (3). See also sections 63 (2), 64 and 66, and the definitions of "notice to quit" and "tenancy" in section 69. A tenancy at will is not included in the definition of "tenancy." See Hill and Redman on Landlord and Tenant, 12th ed., p. 22, para. 11, and p. 26, para. 12, for the main attributes of a tenancy at will, and Woodfall on Landlord and Tenant, 25th ed., pp. 303, 305. In the case of a tenancy at will, there is no term agreed for the tenancy, and that is the difficulty here. The object of the Act is to give security to business tenants and it is hard to see why the legislature should give security to someone who never had security apart from the Act. The sections already referred to are inconsistent with the idea of protecting a tenancy at will. In particular, the court could not have intended to include a tenancy at will in section 23. The provisions in section 25 as to specifying the date at which a tenancy is to come to an end are inapplicable to such a tenancy. If the Court of Appeal was right, the position under section 26 would be intolerable. The tenant at will would be able to remain in possession indefinitely without proceeding further and the landlord would not be able to give him notice without attracting a claim for a new tenancy. It would also mean that a purchaser of land allowed into possession pending completion of the contract would be able to remain in possession indefinitely. Section 43 (3) is a very illuminating subsection. It would be anomalous to exclude from the protection of the Act tenancies for a term not exceeding three months, while including tenancies at will for a far shorter duration. A weekly tenancy is not within the Act unless it comes within section 43 (3) (*b*), and it is improbable that the more impermanent tenancy at will would be included. A tenancy at will is not a legal estate within the Law of Property Act, 1925, and the Act of 1954 applies only to legal tenancies; it does not apply to so fragile an interest as a tenancy at will.

In any event, this is not a case of a tenancy at will. If a tenancy at will existed here it would have to be an implied term that it would not end until the conclusion of the negotiations, and that would be the negation of a tenancy at will. One cannot imply a tenancy at will from mere inactivity. The implied intention must be the intention of both parties to affect their legal relationship in relation to the premises. After April 6, 1955, the respondent became a trespasser: see *Doe* d. *Knight* v. *Quigley* [1]; *Ley* v. *Peter* [2]; *Coggan* v. *Warwicker*,[3] and *Howard* v. *Shaw*.[4]

If the respondent was not a tenant at will it does not matter whether she was a tenant at sufferance or a licensee or a trespasser. As to the distinction between a tenancy at will and a tenancy at sufferance, see Coke upon Littleton (1834 ed.) 57b,

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[1] (1810) 2 Camp. 505.
[2] (1858) 3 H. & N. 101, 107–108.
[3] (1852) 3 Car. & K. 40.
[4] (1841) 8 M. & W. 118.

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s. 72; Hill and Redman on Landlord and Tenant, 12th ed., pp. 20–21, and *Errington* v. *Errington*.[5]

This was not a tenancy at will. The respondent was allowed to remain in the premises until a lease was signed or the negotiations broke down. The conclusion is that she was a licensee: see *Martinali* v. *Ramuz*.[6] See also *Leigh* v. *Dickeson*.[7]

By not having sought protection under section 5 (17) of the Act of 1927 the respondent has now fallen between two stools.

R. E. Megarry Q.C. and *James Fox-Andrews* for the respondent. Assuming that the respondent is a tenant at will, her tenancy is within the Act of 1954. Section 23 includes a tenancy at will; it uses the words "any tenancy." Section 24 (1) is the mainspring of the Act; subsection (2) is a saving provision. As regards section 25 (1), there is no difficulty in specifying the date at which the tenancy is to come to an end. Notice to determine it can be given in accordance with subsection (2). The object of subsections (3) and (4) is to make sure that the statutory notice is longer than the contractual notice and so to prevent the statutory notice from derogating from the tenant's common law rights. Section 26 (1) does not apply to a tenant at will. As to section 30, see *Morgan* v. *William Harrison Ltd.*,[8] a case which would have been clearly within the policy of the Act of 1954 but which would be excluded if a tenancy at will did not come within the definition of "tenancy" in section 69 (1). The case indicates that one can have a tenancy at will which carries all the usual obligations of a tenancy. There is nothing in the nature of a tenancy at will inconsistent with there being a full rent and all the ordinary terms of a tenancy. There is nothing in section 30 or section 33 to prevent a new tenancy being for a fixed term, e.g., quarterly. Section 34 presents no difficulty in fixing an open market rent in such a case as this, nor does section 35 present any difficulty as to other terms. As to section 43 (3), which provides that the Act shall not apply to a tenancy not exceeding three months, the inclusion in the Act of tenancies at will presents no greater anomaly than that presented by the case of a weekly tenancy extended from week to week by the tenant holding over, a case which would be within the protection of the Act. In any event, the exclusion only applies to "a tenancy "granted for a term certain," and so all periodical tenancies are within Part II of the Act. The words "term certain" resolve the whole difficulty, since a periodical tenancy is not "a term "certain." Periodical tenancies are indefinite. A letting for a week, a month or a quarter is for a term certain, but a weekly, monthly or quarterly tenancy is not. As to what constitutes a term certain, see *Doe* d. *Carter* v. *Roe*.[9] As to section 69, there is nothing in the definitions to show that a tenancy at will was not intended to be a tenancy within the Act. A tenancy at will is created by a "tenancy agreement" within the definition. An agreement is of the essence of a tenancy at will and is the feature distinguishing it from a tenancy at sufferance. The words "tenancy created . . . by a tenancy agreement" are apt to include a tenancy at will. If the definition does not include a tenancy at will it is hard to see where to draw the line. Section 69 (2), referring to an agreement in writing, was dealing with agreements such as were contemplated by sections 32 to 35. It would be strange if in this legislation Parliament were drawing a distinction between an oral and a written tenancy.

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[5] [1952] 1 K.B. 290; [1952] 1 T.L.R. 321; [1952] 1 All E.R. 149.

[6] [1953] 1 W.L.R. 1196; [1953] 2 All E.R. 892.

[7] (1884) 15 Q.B.D. 60.

[8] [1907] 2 Ch. 137.

Here a tenancy at will was to be implied. It is common to imply a legal agreement from the conduct of the parties, e.g., by handing over 2d. for a newspaper without uttering a word.

Martinali v. *Ramuz* [10] is a decision, not on the definition of a tenancy, but purely on the terms of section 10 of the Leasehold Property (Temporary Provisions) Act, 1951.

It is not true that on the contentions of the respondent she would be able to remain in possession indefinitely. That presupposes a contract, and the right to remain in possession would depend on the terms of the contract. A purchaser of land left in possession of it pending the completion of the contract may be a tenant at will, but he is not invariably so. According to the Law Society's Conditions of Sale, 1953, condition 6 (1) (*a*) (i) and the National Conditions of Sale, 1953, condition 7 (1) (*i*), such a purchaser occupies the land as a licensee only.

As to the argument that a tenancy at will is not a legal estate within the Law of Property Act, 1925, there is nothing in the Act of 1954 to suggest that it does not apply to equitable tenancies. If it were so, landlords could avoid the Act by dealing only in equitable tenancies.

It is true that a tenancy at will is the lowest form of estate and easily determinable by either party, but it is only a little more fragile than a weekly tenancy.

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[9] (1842) 10 M. & W. 670.

[10] [1953] 1 W.L.R. 1196.

[VISCOUNT SIMONDS indicated that their Lordships did not require to hear argument from the respondent on the point whether or not this was a tenancy at will.]

This is not a case of a person holding under a very short tenancy. The respondent has been in the premises for about 20 years. An order under section 5 (13) of the Landlord and Tenant Act, 1927, would have protected her without any doubt.

James Fox-Andrews following. As to the meaning of "tenancy" in the definition in section 69 (1) of the Act of 1927, see Foa on Landlord and Tenant, 7th ed., p. 3, s. 5, on tenancies at will, which follows the wording of Hill and Redman on Landlord and Tenant. The underlying idea is that a tenancy at will is created by contract or agreement: see *Richardson* v. *Langridge*.[11] Certain tenancies at will might come within the definition in section 69 (1) and others might be excluded. Both tenancies from year to year created by implication of law and tenancies at will so created are within it.

Harold Brown Q.C. in reply. There is an essential distinction between a weekly tenant and a tenant at will in that the former is a tenant and is not there at the mere will of the landlord. Admittedly, as the respondent contends, section 69 (2) does not confine the protection of the Act to written tenancies, but a tenancy at will is not a "tenancy" within the definition. In answering a requisition on title, one would say properly that there was no tenancy agreement in existence if there was only a tenancy at will. The appellant cannot say like Job[12]: "Behold my "desire is . . . that mine adversary had written a book"; he is more fortunate because his adversary has written a book. It cannot be quoted as an authority, because happily his adversary is alive and well, but it is referred to as persuasive. In Megarry on Real Property, 2nd ed., p. 31, it is said: "A tenancy at "will is a tenancy which may continue indefinitely or may be "determined by either party at any time; it is thus less than a "freehold. . . . Indeed, such tenancies are perhaps not estates "at all." A tenancy at will has not the qualities of an estate in land. If the expression had been "occupancy at will," there would have been no difficulty, but, stripped of all inessentials, a tenancy at will is a mere licence. As to *Morgan's* case,[13] the parties themselves called the interest a "tenancy at will," and there was no real argument whether or not it was.

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[11] (1811) 4 Taunt. 128.

[12] Job XXXI, 35.

[13] [1907] 2 Ch. 137.

Their Lordships took time for consideration.

October 31. Viscount Simonds stated the facts and continued: My Lords, it is common ground that the appellant is entitled to recover possession of the premises unless the respondent can avail herself of the protection given by Part II of the Landlord and Tenant Act, 1954, and that she can only do so if she establishes (a) that at the relevant date she was in possession of the premises as tenant at will of the appellant, and (b) that a tenancy at will is protected by the Act. Both these propositions must now be examined.

Upon the first question I do not think it necessary to say much, for I find myself in complete agreement with the county court judge on this point and am content to adopt his careful judgment as my own. Having been in possession as joint or sole lessee under a lease which terminated on September 6, 1943, she thereafter became a quarterly tenant until the expiration on September 29, 1953, of a notice to quit, which had been validly given. Since that date she has remained and she still remains in possession of the premises. In the meantime, both before and after the notice to quit, negotiations took place for the grant of a new lease. These were protracted and exhausting and at an early stage of them the respondent gave notice under the Landlord and Tenant Act, 1927, claiming a new lease or compensation. This was a circumstance which, in my opinion, is of paramount weight in determining in what relation the parties thereafter stood to each other and leads decisively to the conclusion that, pending negotiation, the respondent remained in possession, not as a licensee nor as a tenant at sufferance of the appellant, but with his positive assent. The learned judge, in my opinion, rightly held that she was a typical tenant at will, conforming to all the classical definitions of such a tenant.

The respondent was, then, a tenant at will of the premises when on October 1, 1954, the Landlord and Tenant Act, 1954, came into operation and repealed the relevant provisions of the earlier Act. I do not think that the present proceedings are in any way affected by the provisions of Schedule IX to the Act of 1954 and do not further refer to them.

It remains to be considered whether Part II of the 1954 Act protects a tenancy at will, and upon this question I am of opinion that the judgments under review cannot be supported.

Before I come to the crucial definition of "tenancy" in section 69 (1) of the Act I propose to examine briefly the earlier sections in Part II in which that word occurs. By section 23 (1) it is provided that that Part "applies to any tenancy where the "property comprised in the tenancy is or includes premises which "are occupied by the tenant . . . for the purposes of a business" —a word which is defined to cover a wider range of activities than those which the earlier Act had protected. Section 24 provides for the "continuation and renewal of tenancies"; by subsection (1) it enacts that: "A tenancy . . . shall not come to "an end unless terminated in accordance with the provisions of "this Part of this Act; and, subject to the provisions of section 29 "of this Act, the tenant . . . may apply to the court for a new "tenancy—(*a*) if the landlord has given notice under the next "following section to terminate the tenancy, or (*b*) if the tenant "has made a request for a new tenancy in accordance with "section 26," and by subsection (2) that subsection (1) "shall "not prevent the coming to an end of a tenancy by notice to "quit given by the tenant, by surrender or forfeiture, or by the "forfeiture of a superior tenancy." I pause to note that there are no words in subsection (2) which are apt to cover the case of a tenancy at will. Section 25 is of crucial importance. It purports to deal comprehensively with the way in which a landlord may terminate a tenancy. Subsection (1) is general in its terms; it provides that: "The landlord may terminate a tenancy ". . . by a notice . . . in the prescribed form specifying the date "at which the tenancy is to come to an end (hereinafter referred "to as 'the date of termination')"; the prescribed form does not throw any light on the present problem. Subsection (2) provides that: "Subject to the provisions of the next following "subsection, a notice under this section shall not have effect "unless it is given not more than twelve nor less than six months "before the date of termination specified therein." Subsection (3) deals with that class of "tenancy which apart from the "Act could have been brought to an end by notice to quit given "by the landlord" and enacts what the date of termination in such cases may be. A tenancy at will is not determined by a notice to quit and does not fall within the subsection. Subsection (4) deals with "any other tenancy"—these are the vital words—and provides that: "In the case of any other tenancy, "a notice under this section shall not specify a date of termination earlier than the date on which apart from . . . this Act "the tenancy would have come to an end by effluxion of time." A tenancy at will is not a tenancy which comes to an end by effluxion of time, and does not appear to be within the subsection. The other subsections of this section do not help and I find, therefore, in the section which is a vital part in the machinery of the Act a significant omission of any provision which covers the case of a tenancy at will.

Section 26 deals with a tenant's request for a new tenancy. It covers only the case where the tenancy under which the tenant holds for the time being is a tenancy granted for a term of years certain exceeding one year. It does not apply to a tenant at will. Nor need I refer to sections 27 and 28. Section 29 (1) must be noticed. It provides that: " Subject to the provisions of this " Act, on an application under section 24 (1) of this Act for a " new tenancy the court shall make an order for the grant of a " tenancy comprising such property, at such rent or on such " other terms, as are hereinafter provided." This is mandatory and I attach some importance to it. For there must be many cases, for example, where a purchaser has been let into possession before completion without any special stipulation and is therefore at law a tenant at will, where it would be manifestly unjust to grant any tenancy. I must observe that, notwithstanding the observation of Denning L.J. and the reference to *Errington* v. *Errington*,[1] I cannot but regard the example that I have given as a typical case of a tenancy at will. But there must be still more cases where the court would have nothing to guide it as to what should be the terms of a tenancy granted to a tenant at will. The grant of another tenancy at will would be of little value unless succeeded by another and yet another similar grant, while the grant of a term certain or of a periodical tenancy would substantially change the previously subsisting relation between the parties. I can pass over a number of sections of which it may truly be said that their language is more appropriate to a periodic tenancy or a tenancy for a term certain yet, if the context otherwise admitted, it might be wide enough to cover a tenancy at will, and I come to section 43, which by subsection (3) provides that Part II of the Act " does not apply to a tenancy granted for " a term certain not exceeding three months unless—(*a*) the " tenancy contains provision for renewing the term or for " extending it beyond three months from its beginning; or (*b*) the " tenant has been in occupation for a period which, together with " any period during which any predecessor in the carrying on of " the business carried on by the tenant was in occupation, exceeds " six months." Counsel for the appellant relied strongly on

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[1] [1952] 1 K.B. 290; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149.

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this section. He justly pointed out the anomaly of excluding from the protection of the Act tenancies granted for a term certain not exceeding three months, unless certain conditions are satisfied, but bringing within its protection tenancies at will whose duration might be for a far shorter period. The answer made to this was that it was no greater anomaly than that which was provided by a weekly tenancy which had been extended from week to week by a tenant holding over, and would, it was claimed, be within the protection of the Act. I am not satisfied what the rights of such a tenant would be, and do not think it desirable to discuss it. It is sufficient to say that in section 43 (3) I find once more language which is not appropriate to the case of a tenancy at will and which I should expect to find extended or amplified if such a tenancy was intended to be protected.

I come, then, to the interpretation section, section 69 (1). There are only two expressions to be considered which have meanings assigned to them without the usual qualification of an admitting context. "'Notice to quit' means a notice to "terminate a tenancy (whether a periodical tenancy or a tenancy "for a term of years certain) given in accordance with the "provisions (whether express or implied) of that tenancy." I have already observed that a tenancy at will is not terminated by such a notice, or, I should say more accurately, that such a notice is not appropriate or necessary to the termination of such a tenancy. The other relevant expression is "tenancy," which means "a tenancy created either immediately or derivatively "out of the freehold, whether by a lease or underlease . . . or "by a tenancy agreement or in pursuance of any enactment "(including this Act) . . ." A "tenancy," then, includes a tenancy "created . . . out of the freehold . . . by a tenancy "agreement." Can a tenancy at will be thus described? And, if it might in another context be so described, is the description itself at least ambiguous so that its meaning may be influenced by the context of the Act? I do not find these easy questions to answer. It may, I think, be truly said that, since a tenant at will is regarded at law as being in possession by his own will and at the will, express or implied, of his landlord, he is a tenant by their mutual agreement, and the agreement may therefore be called a tenancy agreement. He is distinguished from a tenant at sufferance in that such a tenant is said to be in possession without either the agreement or disagreement of the landlord. But, my Lords, though upon a logical analysis it is possible to regard a tenancy at will as a "tenancy created by a tenancy "agreement," I am not satisfied that according to the ordinary use of language, even apart from any context, it would be so described. A tenancy at will, though called a tenancy, is unlike any other tenancy except a tenancy at sufferance, to which it is next-of-kin. It has been properly described as a personal relation between the landlord and his tenant: it is determined by the death of either of them or by any one of a variety of acts, even by an involuntary alienation, which would not affect the subsistence of any other tenancy. It is true that in some cases the relation of tenant at will may be expressly created by contract (see, for example, *Morgan* v. *William Harrison Ltd.*[2]), but this is an exceptional case and I do not exclude the possibility of such a contract being a "tenancy agreement" even if a tenancy at will arising by implication of law is not.

If I am right in concluding, as I do, that "tenancy agreement" is itself an expression which is ambiguous in its scope, I am led by the context of the Act, which I have examined in some detail, to the further conclusion that it does not cover a tenancy at will arising by implication of law. It may or may not be unfortunate that the respondent in this case cannot avail herself of the protection which the Act affords: in the case of another tenancy at will the misfortune might lie the other way. Your Lordships are concerned only to interpret the Act, and, in my opinion, upon its true interpretation the respondent is not protected. The orders of the Court of Appeal and of the county court judge should therefore be reversed so far as the appellant's claim to possession of the premises is concerned. The orders as to costs will not be disturbed and there will be no order as to the costs of this appeal. I move your Lordships accordingly.

My Lords, my noble and learned friend, Lord Keith of Avonholm, who is unable to be here today, has asked me to say that he concurs in the opinion which I have given.

LORD MORTON OF HENRYTON. My Lords, two questions arise on this appeal—(1) On October 1, 1954, when the Landlord and Tenant Act, 1954, came into operation, was the respondent a tenant at will of the ground floor of No. 59, Grosvenor Road, Tunbridge Wells? (2) If so, is a tenancy at will protected by the Act?

The first question is not an easy one. A tenancy at will can only arise with the consent, express or implied, of the landlord. I think there is much to be said for the view that the appellant never consented to the respondent's occupation after September 29, 1953, but took no active steps to recover possession, on the principle that "what cannot be cured must be endured," because he knew that any application for possession would be countered by an application for protection under section 5 (13) of the Landlord and Tenant Act, 1927. If this were the true view, the respondent would be a tenant on sufferance. I find it unnecessary to form a concluded opinion on this point, for, in my opinion, the respondent is not protected by the Act of 1954, even if she is a tenant at will; I think that section 69, read by itself, gives rise to a very real doubt as to whether a tenancy at will is or is not "a tenancy created . . . out of the freehold . . . by a "tenancy agreement" within the meaning of the definition of "tenancy" in that section. This being so, it is right to seek enlightenment on the point from the rest of the Act, and, in my view, a study of sections 23 to 29 inclusive, and in particular subsections (3) and (4) of section 25, leads inevitably to the conclusion that a tenancy at will is not within the Act. I agree with everything which has been said from the Woolsack as to this group of sections.

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[2] [1907] 2 Ch. 137.

I add that I should have thought it surprising if the legislature had intended to bring within the scope of the Act a relationship so personal and so fleeting as a tenancy at will. It is certainly unfortunate for the respondent that she gets no protection, but the circumstances of the present case are most unusual, and I cannot think that any real injustice is involved, having regard to the course of the protracted negotiations. On the other hand, I think that, if the Act had been extended to tenants at will, undeserved hardship to the house-owner would have resulted in many cases.

LORD COHEN stated the facts and continued: My Lords, the respondent did not apply, as she could have done under section 5 (13) of the Act of 1927, for an interim order authorizing her to continue in possession of the premises for such time and on such terms as the tribunal might allow. No doubt there were good reasons why she did not do so, but, unfortunately for her, on October 1, 1954, while the negotiations were still pending, the Landlord and Tenant Act, 1954, came into force. This repealed sections 4 to 7 of the 1927 Act under which the respondent had commenced the adjourned proceedings. Paragraph 8 of Schedule IX to the 1954 Act contained transitional provisions for the protection of persons who had obtained an interim order under section 5 (13) of the 1927 Act, but these provisions do not assist the respondent. Her right to resist the claim for possession must depend on the operative provisions which are to be found in Part II of the 1954 Act.

Before I turn to these provisions I should mention that negotiation continued up to April 6, 1955, when the appellant's patience seems to have been exhausted and his solicitors wrote to the respondent's solicitors asking that the respondent should vacate the premises immediately.

On April 7, 1955, the appellant issued his summons for possession in the Tunbridge Wells County Court. The respondent set up a number of defences. Only one of them is now material. That is the defence that the respondent is and has, since Michaelmas, 1953, been a tenant at will and is therefore entitled to remain in possession.

The case came on for hearing on June 28, 1955, when Mr. J. Fox-Andrews, for the respondent, argued that the respondent was a tenant at will and that such a tenancy was covered by the protection given by the 1954 Act. This submission was upheld by the county court judge in a considered judgment delivered on July 28, 1955. On October 24, 1955, the Court of Appeal affirmed his judgment. It is from this decision that the present appeal is brought.

Before dealing with the arguments addressed to your Lordships I must refer to the relevant provisions in Part II of the 1954 Act.

" *Continuation and renewal of tenancies:*

" 24.—(1) A tenancy to which this Part of this Act applies " shall not come to an end unless terminated in accordance with " the provisions of this Part of this Act; and, subject to the " provisions of section 29 of this Act, the tenant under such a " tenancy may apply to the court for a new tenancy—(*a*) if the " landlord has given notice under the next following section to " terminate the tenancy, or (*b*) if the tenant has made a request " for a new tenancy in accordance with section 26 of this Act. " (2) The last foregoing subsection shall not prevent the coming " to an end of a tenancy by notice to quit given by the tenant, " by surrender or forfeiture, or by the forfeiture of a superior " tenancy. . . .

" 25.—(1) The landlord may terminate a tenancy to which " this Part of this Act applies by a notice given to the tenant " in the prescribed form specifying the date at which the tenancy " is to come to an end (hereinafter referred to as ' the date of

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" 'termination'): Provided that this subsection has effect subject " to the provisions of Part IV of this Act as to the interim " continuation of tenancies pending the disposal of applications " to the court. (2) Subject to the provisions of the next following " subsection, a notice under this section shall not have effect " unless it is given not more than twelve nor less than six months " before the date of termination specified therein. (3) In the case " of a tenancy which apart from this Act could have been " brought to an end by notice to quit given by the landlord— " (*a*) the date of termination specified in a notice under this " section shall not be earlier than the earliest date on which " apart from this Part of this Act the tenancy could have been " brought to an end by notice to quit given by the landlord on " the date of the giving of the notice under this section; and " (*b*) where apart from this Part of this Act more than six " months' notice to quit would have been required to bring the " tenancy to an end, the last foregoing subsection shall have " effect with the substitution for twelve months of a period six " months longer than the length of notice to quit which would " have been required as aforesaid. (4) In the case of any other " tenancy, a notice under this section shall not specify a date of " termination earlier than the date on which apart from this Part " of this Act the tenancy would have come to an end by effluxion " of time."

Section 26 enables a tenant who is holding under a tenancy for a term of years certain exceeding one year, or granted for a term of years certain and thereafter from year to year, to request a new tenancy, but this provision is not available to the respondent.

Sections 33, 34 and 35 deal respectively with the duration, the rent payable under, and the other terms of a new tenancy granted pursuant to the Act. I need not set out the sections in full. I only mention them because the appellant submitted that they seemed more applicable to a case where the applicant for a new tenancy was a tenant under a periodical tenancy, or for a term certain, than to a case where he was a tenant at will. I do not myself get much assistance from the provisions of these sections.

Section 43 (3) is in the following terms: " This Part of this " Act does not apply to a tenancy granted for a term certain not " exceeding three months unless—(*a*) the tenancy contains pro" vision for renewing the term or for extending it beyond three " months from its beginning; or (*b*) the tenant has been in " occupation for a period which, together with any period during "which any predecessor in the carrying on of the business carried "on by the tenant was in occupation, exceeds six months."

The appellant relied on this subsection because, as he said, it showed that a weekly tenancy was not within Part II of the Act unless the terms could be brought within paragraph (*b*). It was unlikely, so the argument went, that Parliament intended the still more impermanent tenancy at will to be within Part II of the Act. The respondent countered this argument by pointing out that the exclusion only applies to tenancies "granted "for a term certain" and a weekly tenancy is not a term certain. All periodical tenancies were therefore within Part II of the Act.

The last, and the most important, section to which I need refer is the interpretation section, section 69. Subsection (1) provides that: "In this Act the following expressions have the "meanings hereby assigned to them respectively, that is to "say:—. . . 'notice to quit' means a notice to terminate a "tenancy (whether a periodical tenancy or a tenancy for a term "of years certain) given in accordance with the provisions "(whether express or implied) of that tenancy; . . . 'tenancy' "means a tenancy created either immediately or derivatively out "of the freehold, whether by a lease or underlease, by an agreement for a lease or underlease or by a tenancy agreement or "in pursuance of any enactment (including this Act), but does "not include a mortgage term or any interest arising in favour "of a mortgagor by his attorning tenant to his mortgagee, and "references to the granting of a tenancy and to demised property "shall be construed accordingly; . . ." Subsection (2) provides that: "References in this Act to an agreement between the "landlord and the tenant (except in section 17 and subsections "(1) and (2) of section 38 thereof) shall be construed as references to an agreement in writing. . . ." At first sight it might be thought that "a tenancy agreement" mentioned in section 69 (1) came within the operation of this subsection, but Mr. Brown, for the appellant, did not feel able to support this suggestion and admitted that subsection (2) was dealing only with agreements between landlord and tenant such as were contemplated, for example, by sections 32 to 35 inclusive. I need not, therefore, trouble your Lordships further with subsection (2).

With these sections in mind I turn to the arguments which were addressed to your Lordships. It was common ground between the parties that there were two questions which your Lordships had to decide: (1) When the present proceedings were commenced, was the relationship between the parties that of a tenancy at will? Unless it was, it was common ground that the appellant was entitled to succeed. But if it was, then the second question arises. (2) Is a tenancy at will a tenancy within the meaning of the Act?

My Lords, on the first question I find myself in complete agreement with the county court judge when he says: "In my "opinion the defendant was a typical tenant at will, conforming "to all the classical definitions of such a tenant. I refer to "Woodfall's Law of Landlord and Tenant, 23rd ed., pp. 283, "284; Foa, 7th ed., p. 3, and Hill and Redman, 10th ed., pp. 16 "and 17, and the cases cited by those authorities. She was "not in my view a mere licensee because she was in exclusive "possession with the consent of the owner; nor was she a "tenant at sufferance because I think the landlord's positive "assent must be implied from the circumstances." I would, therefore, answer the first question in the affirmative, and I turn to the second question.

Mr. Megarry, for the respondent, says that a tenancy at will is "a tenancy agreement" within the meaning of section 69 (1), since a tenancy at will is a tenancy and agreement is of the essence of a tenancy at will; it is indeed the feature which distinguishes a tenancy at will from a tenancy at sufferance. I am prepared to accept that the expression "a tenancy agreement" may comprise a tenancy at will, but I think that it might also be the apt language to use where the draftsman had in mind only a tenancy for a fixed term and a periodical tenancy. The question of the sense in which it is used in a particular statute must be answered by construing the statute as a whole, and, in my opinion, the language of section 25 is consistent only with the adoption of the narrower construction I have indicated. It is, I think, clear, reading subsections (2), (3) and (4) together, that subsections (3) and (4) are intended to comprise all the tenancies to which the Act applies. Subsection (3) deals only with tenancies which could be determined by notice to quit, and it was common ground between the parties that a tenancy at will is not such a tenancy, since a tenancy at will is determined, not by a notice to quit, but, for example, by death, bankruptcy or a demand for possession. Subsection (4) is to apply "in the case "of any other tenancy." This is an omnibus phrase covering all tenancies to which the Act applies except such as are determinable by a notice to quit. It is clear, however, from the language

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of the subsection that it cannot comprise a tenancy at will because such a tenancy could never come to an end by effluxion of time.

In the Court of Appeal their Lordships sought to avoid this conclusion by treating subsection (2) as governing the matter in the case of any tenancy falling outside the scope of subsections (3) and (4). My Lords, I am unable to find anything in the language of subsections (1) and (2) which justifies me in ignoring what I think to be the plain meaning of subsections (3) and (4), nor am I able to find any indication in any other section which would lead me to place the wider meaning on the expression "tenancy agreement" for which Mr. Megarry argues.

He relied on the case of *Morgan* v. *William Harrison Ltd.*,[2] which was a case where the court held upon the construction of certain correspondence that the defendant, who had been tenant of a coal-mine and remained in possession after the expiration of his lease, was a tenant at will with a right to get the coal and a right to exercise a way-leave and that he held on all the terms and conditions of the original tenancy so far as applicable to a tenancy at will, including an arbitration clause. Mr. Megarry submitted that such a case was clearly within the policy of the 1954 Act, but would be excluded from its operation unless a tenancy at will were held to fall within the definition of "tenancy" in section 69 (1). My Lords, I agree with Mr. Megarry that on the construction which I have placed on the 1954 Act tenancies such as that under consideration in the case cited would be outside the scope of Part II of the Act, but I believe them to be rare. Certainly your Lordships' attention was not directed to any other such case and I console myself with the reflexion that mining leases are, in any event, excluded by section 43 (1).

I derive some support for the conclusion I have reached from the decision of the Court of Appeal in *Martinali* v. *Ramuz*.[3] That was a case under the Leasehold Property (Temporary Provisions) Act, 1951. Section 10 of that Act enabled an occupier of shop premises to apply for, and, in certain circumstances, to obtain, the grant of a new tenancy where the expiring tenancy would come to an end immediately before the Act came into force or within two years beginning from that date, "and would so "come to an end by effluxion of time or by the expiration of a "notice to quit given by the landlord." The Act contained in section 20 a definition of tenancy the same, in all material respects, as that contained in section 69 (1) of the 1954 Act. The tenant died and his executors applied for a new lease under section 69 (1). The county court judge heard a preliminary objection that the occupier was a tenant at will, and that, as his occupation had not been determined by notice to quit and it was not a tenancy which expired by effluxion of time, it was not covered by section 10 of the 1951 Act. The county court judge decided the case on the ground that no notice to quit had been given, but he expressed the opinion obiter that a tenancy at will did not fall within the protection afforded by the 1951 Act. In the Court of Appeal Singleton L.J. expressed the same view; the other members of the court did not deal with the point.

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[2] [1907] 2 Ch. 137.

[3] [1953] 1 W.L.R. 1196; [1953] 2 All E.R. 892.

My Lords, the wording of section 10 of the 1951 Act is no doubt more definite than anything to be found in the 1954 Act, but section 25 of the 1954 Act, as I read it, also indicates that the protection afforded by that Act was intended only to apply to tenancies determinable by effluxion of time or notice to quit.

For these reasons I would allow the appeal and discharge the orders in the courts below save so far as they ordered the appellant to pay the costs of the respondent. The appellant is entitled to an order for possession and mesne profits. Each party will bear his own costs of the appeal.

LORD SOMERVELL OF HARROW. My Lords, I agree that the respondent was a tenant at will. The question remains whether a tenancy at will is within the Act. If the definition of " tenancy " in section 69 plainly excluded a tenancy at will, that would be an end of the case. I do not think it does. Nor do I think it plainly includes it. Tenancies at will have such special characteristics that it would be convenient if definitions expressly stated whether they were included or excluded. One turns, therefore, to the other provisions of the Act.

Section 25, in my opinion, makes it clear that tenancies at will are excluded. Subsections (3) and (4) provide in effect that the statutory notice must not take effect at a date earlier than that on which the tenancy would end or could be ended. The opening words of subsection (4) show that all tenancies covered by this Part of the Act are covered by these two subsections. Tenancies at will are not brought to an end by a notice to quit and are therefore outside subsection (3), nor by effluxion of time and are therefore outside subsection (4). They are, therefore, outside the Act. Hodson L.J. clearly felt that these subsections created a considerable difficulty. He thought, and here I differ, with respect, that tenancies at will were clearly within the definition. That being so, he felt that section 25 could not, except by express words, exclude them. It left them " in the air." If, as I think, the definition is at best ambiguous, the effect of section 25 is to resolve the ambiguity.

There may be some tenancies at will, and this may be one, which one would have expected to find covered by the Act, but it would be surprising if the Act were applicable to tenancies at will generally. It would be absurd if a prospective purchaser, who had entered into possession pending completion was within the Act, and yet such a purchaser, in the absence of agreement to the contrary, is a tenant at will. Permissive occupation without payment of rent would also be a relationship one would not expect to find within this Part of the Act.

It was submitted with, I thought, some force that as under paragraph 8 of Schedule XI a tenant who had got an order for extended possession under section 5 (13) of the Landlord and Tenant Act, 1927, was protected, so should, also, a tenant be protected who had been allowed by the landlord to remain in possession without an order. Parliament may have assumed that in such cases possession would have continued on the basis of a periodical tenancy to which the Act of 1954 would apply, and not, as here, on a tenancy at will. The fact that paragraph 10 provides expressly for the preservation of the right to compensation under section 4 of the Act of 1927 suggests that Parliament assumed that the more favourable rights conferred by the new Act for new tenancies would apply. It has, however, for the reasons which I have given, excluded tenancies at will, and, on the facts of the present case, I cannot think that the respondent has any real grievance.

I would allow the appeal.

Appeal allowed.

Solicitors: *Sole, Sawbridge & Co. for Bailey & Cogger, Tonbridge; Waterhouse & Co.*

F. C.

H. L. (E.)*

1956
Oct. 22, 23,
24, 25, 29,
30;
Dec. 5.

[HOUSE OF LORDS.]

ATTORNEY-GENERAL . . . . . APPELLANT;

AND

PRINCE ERNEST AUGUSTUS OF HANOVER RESPONDENT.

Nationality—Naturalization—Royal family—Statutory naturalization of Princess Sophia and "all Persons lineally descending from Her" —Whether limited to persons born in Queen Anne's lifetime— Effect of preamble on interpretation of statute—Princess Sophia Naturalization Act, 1705 (4 *Anne, c.* 4).

Statute—Construction—Preamble. Statute—Construction—Absurdity.

Statute—Construction—Subsequent enactments—Whether relevant in interpreting earlier one.

A great great grandson of Ernest, Duke of Cumberland (a descendant of the Princess Sophia, Electress of Hanover), who succeeded to the throne of Hanover in 1837, sought a declaration that he was a British subject by virtue of the statute of 1705, 4 Anne, c. 4 (otherwise known as 4 & 5 Anne, c. 16).

The statute, after reciting in the preamble that the Crown, on the death of Queen Anne without issue, was limited to the Princess Sophia and her issue, continued: ". . . to the end [that] the said "Princess . . . and the issue of her body, and all persons lineally "descending from her, may be encouraged to become acquainted "with the laws and constitutions of this realm, it is just and "highly reasonable, that they, in Your Majesty's Life Time . . . "should be naturalized" and proceeded to enact that "the said "Princess . . . and the issue of her body, and all persons lineally "descending from her, born or hereafter to be born, be and shall "be . . . deemed . . . natural born subjects of this Kingdom":—

Held that, as a matter of construction of the Act, there was nothing in the Act or its preamble, interpreted in the light of the earlier relevant statutes 7 Jac. 1, c. 2, and 4 Anne, c. 1 (otherwise known as 4 & 5 Anne, c. 14), capable of controlling and limiting the plain and ordinary meaning of the material words of the enacting provisions and that the class of lineal descendants "born or "hereafter to be born" meant the class of such descendants in all degrees without any limit as to time. Looking at the Act from the point of view of 1705 there was no such manifest absurdity in this construction as would entitle the court to reject it.

Per Viscount Simonds. Assistance may be obtained from the preamble to a statute in ascertaining the meaning of the relevant enacting part, since words derive their colour and content from their context. But the preamble is not to affect the meaning otherwise ascribable to the enacting part unless there be a compelling reason and it is not a compelling reason that the enacting words go further than the preamble indicated.

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* *Present*: VISCOUNT SIMONDS, LORD NORMAND, LORD MORTON OF HENRYTON, LORD TUCKER and LORD SOMERVELL OF HARROW.

Powell v. *Kempton Park Racecourse Co. Ltd.* [1899] A.C. 143; 15 T.L.R. 266 considered.

Decision of the Court of Appeal [1956] Ch. 188; sub nom. *H.R.H. Prince Ernest Augustus of Hanover* v. *Attorney-General* [1955] 3 All E.R. 647 affirmed.

APPEAL from the Court of Appeal (Evershed M.R., Birkett and Romer L.JJ.).

This was an appeal from an order dated November 16, 1955, of the Court of Appeal, whereby the court discharged a judgment dated March 1, 1955, of Vaisey J. and declared that the respondent, H.R.H. Prince Ernest Augustus of Hanover, was, immediately before the coming into force of the British Nationality Act, 1948, a British subject and that he was, by virtue of that Act, a British subject.

The question at issue in this appeal was whether or not the respondent was by virtue of a statute of Queen Anne's reign of 1705 a British subject immediately before the coming into force of the Act of 1948. The Act of 1948 repealed the statute of Queen Anne's reign (which was referred to in Part II of Schedule IV to the Act of 1948 as "the Act of 4 & 5 Anne, "c. 16," but was called "4 Anne, c. 4" in the Statutes at Large), but it was conceded by the appellant, the Attorney-General, that, if at the date of the commencement of the Act of 1948 the respondent was a British subject, he remained such by virtue of section 12 (4) of the Act of 1948.

The statute of 1705 was as follows:

"An Act for the Naturalization of the Most Excellent Prin-"cess Sophia, Electress and Duchess Dowager of Hanover, and "the Issue of Her Body.

"WHEREAS the Imperial Crown and Dignity of the Realms "of England, France, and Ireland, and the Dominions thereto "belonging, after the Demise and Death of Your Majesty, Our "Most Gracious Sovereign, without Issue of Your Body, is limited "by Act of Parliament, to the Most Excellent Princess Sophia, "Electress and Duchess Dowager of Hanover, Granddaughter of "the late King James the First, and the Heirs of Her Body, "being Protestants: And whereas Your Majesty, by Your Royal "Care and Concern for the Happiness of these Kingdoms, reigns "in the Hearts and Affections of all Your People, to their great "Comfort and Satisfaction, and will be a glorious Example of "Your Royal Successors in future Ages: And to the End the said

"Princess Sophia, Electress and Duchess Dowager of Hanover, "and the Issue of Her Body, and all Persons lineally descending "from Her, may be encouraged to become acquainted with the "Laws and Constitutions of this Realm, it is just and highly "reasonable, that they, in Your Majesty's Life Time (whom God "long preserve) should be naturalized, and be deemed, taken "and esteemed natural born Subjects of England: We Your "Majesty's most dutiful and loyal Subjects, the Lords Spiritual "and Temporal, and Commons, in Parliament assembled, do "most humbly beseech Your Majesty that it may be enacted; "and therefore be it enacted by the Queen's Most Excellent "Majesty, by and with the Advice and Consent of the Lords "Spiritual and Temporal, and the Commons, in this present "Parliament assembled, and by the Authority of the same, "That the said Princess Sophia, Electress and Duchess Dowager "of Hanover, and the Issue of Her Body, and all Persons "lineally descending from Her, born or hereafter to be born, be "and shall be, to all Intents and Purposes whatsoever, deemed, "taken and esteemed natural-born Subjects of this Kingdom, as "if the said Princess, and the Issue of Her Body, and all "Persons lineally descending from Her, born or hereafter to be "born, had been born within this Realm of England; any Law, "Statute, Matter, or Thing whatsoever to the contrary notwithstanding. Provided always, and be it further enacted and "declared by the Authority aforesaid, That every Person and "Persons, who shall be naturalized by virtue of this Act of "Parliament, and shall become a Papist, or profess the Popish "Religion, shall not enjoy any Benefit or Advantage of a natural "born Subject of England; but every such Person shall be "adjudged and taken as an Alien, born out of the Allegiance of "the Queen of England, to all Intents and Purposes whatsoever; "any Thing herein contained to the contrary notwithstanding."

The respondent was a lineal descendant of the Princess Sophia and was not a Papist and did not profess the Popish religion.

The other relevant enactments are fully stated in the opinion of Viscount Simonds.

Sir Reginald Manningham-Buller Q.C., A.-G. and *Bryan Clauson* for the appellant. The descendants of the Electress Sophia include, or have included, the late Kaiser, the German, Dutch, Danish, Norwegian, Swedish, Greek, Rumanian, Yugoslav and Russian royal families. The effect of the Act of 1705 is and was only to naturalize those lineal descendants of the Electress

Sophia who were born in her lifetime. At the passing of the Act she had three sons alive, George (who became George I), Maximilian William and Ernest Augustus. She had two grandsons alive at that time, George (who became George II) and Frederick William (later King of Prussia), and one granddaughter, Sophia Dorothea (who later married her cousin Frederick William). At the death of Queen Anne in 1714 the living descendants of the Electress also included two great grandsons, Frederick Lewis (afterwards Prince of Wales, son of George II) and Frederick (afterwards King of Prussia, called "the Great"), three great granddaughters, Anne, Amelia Sophia Eleanor and Caroline Elizabeth (sisters of Frederick Lewis), another great granddaughter, Frederica Sophia Wilhelmina (sister of Frederick). Thus there were six lineal descendants born when the Act was passed and six more born before Queen Anne died. It is to be noted that Phillipine Charlotte, who was born in 1716 and died in 1801, a sister of Frederick, married Carl, Duke of Brunswick-Wolfenbuttel, and had a son, Charles William Ferdinand, Prince of Brunswick Lunenburg, who was naturalized by Act of Parliament in 1763–4.

The Act 7 Jac. 1, c. 2 of 1609, provided that all persons over the age of 18 years who were to be naturalized must first receive the Sacrament of the Lord's Supper and take the Oath of Allegiance and the Oath of Supremacy in the manner therein prescribed. When the question arose of naturalizing the Electress Sophia and her descendants, some amendment had to be made to this Act. This was done by a preliminary Act, 4 Anne, c. 1 (also known as 4 & 5 Anne, c. 14), which enacted that whereas the Electress "and the issue of her body are to be naturalized and "by reason of their being beyond the seas they cannot qualify "themselves thereunto" according to the formalities of the Act of James I, a Bill for their naturalization should be exhibited, "any law . . . to the contrary notwithstanding." This Act shows clearly the reason for the statute 4 Anne, c. 4, and the intention to provide for the naturalization of the issue of the Electress who were then alive and then beyond the seas. It operates in relation to persons within the scope of the Act of 1609.

In the Act 4 Anne, c. 4, the words "in Your Majesty's Life "Time" cover both parts of the sentence in which they occur, and that sentence shows the intention to naturalize those descendants of the Electress born in Queen Anne's lifetime, and no more. The intention is wider than that of 4 Anne, c. 1, which was that those overseas should be naturalized. Those who were born after 1705 and before 1714 would be naturalized at birth and so the Act of James I would not apply to them at all.

This question does not just affect the respondent and some 400 other persons. It has wider repercussions, for it might be argued that a family all members of which were, in the Court of Appeal's view, British by the Act of 1705, could not be foreign for the purposes of the Royal Marriages Act, 1772. That would throw doubt on some interests taken under marriage settlements and on the right to some titles.

In the Act 4 Anne, c. 4, the words " born or hereafter to be " born " were intended to make it perfectly clear that the Act was to cover some born after its passage.

As to the rules for the construction of this Act, see Maxwell on Interpretation of Statutes, 10th ed., pp. 1–2, 17, 19. They cover both the preamble and the enacting part of the Act.

In 1705 the position as to the succession to the Crown was settled by the Bill of Rights, 1688 (1 Will. & Mar., sess. 2, c. 2). The Act of 1705 shows that it was then thought desirable that the Electress and those of her descendants who were then living should become acquainted with the laws and constitutions of England. It can hardly have been an object of this Act that all her descendants throughout the centuries should become so acquainted. The important point is that without the Act 4 Anne, c. 4, the successor of Queen Anne would not have been English at the time of accession. There was no need to legislate for the nationality of the children born to Queen Anne's successor after accession, because they would be British anyhow under the Act 25 Edw. 3, stat. 1. In 1705 it was evident that the Electress or one of her descendants born in Queen Anne's lifetime must be Queen Anne's successor or the Act of Settlement would fail. With the Jacobite troubles, there was a very real object in securing that her successor should be British or English before the moment of succession. Parliament should not be assumed to have intended what the respondent contends, especially as it is contrary to the intention expressed in the preamble, which only applies to those born in Queen Anne's lifetime. The enacting words do not make it necessary to give the Act a wider effect than the expressed intention.

The following propositions are submitted: (1) The fundamental rule of interpretation, to which all others are subordinated, is that the statute is to be expounded according to the intent of them that made it. (2) To discover that intention it is proper to read, not only the enacting words, but also the preamble, and to have regard to the surrounding circumstances. (3) If the enacting words are specific, they must have effect given to them, whatever the preamble may contain. (4) If, on the other hand, the enacting words are general (as opposed to specific) or ambiguous, or if there is a doubt as to the meaning to be given to them, then the preamble may explain them, limit them or widen them, and the court may consider the fact that, by not giving a limited meaning to general words, absurdity or inconvenience may arise. It is not submitted that one can construe an Act in the light of what happened later. (5) It is not necessary for the enacting words to be ambiguous before the preamble can be used, so long as they are phrased in general terms.

Here there is a conflict between the intent of the Act as shown in the preamble and the general words of the enacting part, which may be interpreted as going further than Parliament intended. The Act should be construed very strictly.

If the respondent were right, the Act 4 Anne, c. 4, would indicate a very great extension of the intent of the Act 4 Anne, c. 1. There was no need of the latter Act in relation to unborn members of the family of the Electress and its only purpose was to make it possible to bring in a Bill to naturalize those then living and over 18 years of age, despite the Act of James I. The Act 4 Anne, c. 4, went further and included those living born in the lifetime of Queen Anne. That was the expressed intention of the preamble. The practice was not to naturalize people who were not alive.

In 1705 there must have been a desire that the taunt should not be used by the Jacobites that the successor to the English throne was a foreigner. Naturalization could have been limited to the next in succession, but Parliament may have thought it safer to go further. In 1705 the Electress was 75 years old; she was next in succession. It would be one thing to naturalize ex abundanti cautela her descendants living then and born during the lifetime of Queen Anne and another to naturalize all her descendants throughout the centuries.

The statute 25 Edw. 3, stat. 1, is the basis of the law as to the nationality of children born abroad. The matter was considered in *Rex* v. *Albany Street Police Station Superintendent.*[1]

As to the question of giving effect to the intention of Parliament, both *Powell* v. *Kempton Park Racecourse Co. Ltd.*[2] and the *Sussex Peerage Case* [3] ignored the long line of decisions that it is permissible to restrict the generality of words so as to accord with the intention of Parliament. In those two cases those decisions were not cited or considered. That line of decisions starts with *Stradling* v. *Morgan* [4] and *Eyston* v. *Studd.*[5] *Eastman Photographic Materials Co. Ltd.* v. *Comptroller-General of Patents, Designs and Trade Marks* [6] approves the former case. See also *Stowel* v. *Zouch* [7]; *Copeman* v. *Gallant* [8]; *Ryall* v. *Rolle* [9]; *Crespigny* v. *Wittenoom* [10]; *Brett* v. *Brett* [11]; *Halton* v. *Cove* [12]; *Salkeld* v. *Johnson* [13]; *Reg.* v. *Bateman* [14]; *Hughes* v. *Chester and Holyhead Railway Co.*[15]; *Caledonian Railway Co.* v. *North British Railway Co.*[16]; *West Ham Churchwardens and Overseers* v. *Iles* [17]; *Yates* v. *The Queen* [18]; *Reg.* v. *Clarence* [19]; *Cox* v. *Hakes*,[20] and *Watney, Combe, Reid & Co. Ltd.* v. *Berners.*[21]

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[1] [1915] 3 K.B. 716, 717–718, 719, 720, 722; 31 T.L.R. 634.

[2] [1897] 2 Q.B. 242; 13 T.L.R. 443; [1899] A.C. 143; 15 T.L.R. 266.

As to *The Sussex Peerage Case*,[22] no argument was there presented to the House on the construction of statutes, and there were no doubts arising from the preamble of the Act there in question. The words of the statute were in themselves precise and unambiguous. What Tindal C.J. said [23] on the construction of statutes was only a general observation. All he was saying was that if a statute is specific in its terms one cannot go beyond it, but that if a doubt arises one is entitled to look at the preamble and the surrounding circumstances. The ambiguity may be latent, only appearing when one looks at the surrounding circumstances.

As to *Powell* v. *Kempton Park Racecourse Co. Ltd.*,[24] it is hard to say what it really decided on the point of looking at the

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[3] (1844) 11 Cl. & Fin. 85.

[4] (1560) 1 Plowd. 199, 203, 204, 205.

[5] (1574) 2 Plowd. 463, 464.

[6] [1898] A.C. 571, 575–576; 14 T.L.R. 527.

[7] (1569) 1 Plowd. 353, 356, 369.

[8] (1716) 1 P.Wms. 314, 317, 318, 320.

[9] (1749) 1 Atk. 165, 169, 174, 175, 178–179, 182.

[10] (1792) 4 Term Rep. 790, 792, 793.

[11] (1826) 3 Add. 210, 214–220.

[12] (1830) 1 B. & Ad. 538, 556–557, 558.

[13] (1848) 2 Exch. 256, 273, 278–279, 282–283; (1849) 1 Mac. & G. 242.

[14] (1857) 27 L.J.M.C. 95.

[15] (1861) 1 Dr. & Sm. 524, 526–527, 534, 535–537, 540–541, 542, 544; (C.A.) 3 De G.F. & J. 352.

[16] (1881) 6 App.Cas. 114, 121, 122, 124, 126–127, 131–133, 136–137, 137–138.

[17] (1883) 8 App.Cas. 386, 388–389.

[18] (1885) 14 Q.B.D. 648, 653–654, 655–657, 657–658, 659, 659–660, 664–665; sub nom. *Reg.* v. *Yates*, 1 T.L.R. 193.

[19] (1888) 22 Q.B.D. 23, 65; 5 T.L.R. 61.

[20] (1890) 15 App.Cas. 506, 517, 518, 519, 525, 526, 529; 6 T.L.R. 465.

[21] [1915] A.C. 885, 891; 31 T.L.R. 449.

[22] 11 Cl. & Fin. 85, 141–142, 143–144, 147.

[23] Ibid. 143.

[24] [1897] 2 Q.B. 242, 249–250, 251, 255–256, 256–257, 260, 261, 265–266; [1899] A.C. 143, 157, 158, 165, 167, 177, 182–183, 183–185, 192–193.

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preamble. The decision was on the construction of the enacting words, irrespective of the preamble. None of the cases before 1899 was there brought to the attention of the House.

The language of the preamble to the statute 4 Anne, c. 4, is clear. That preamble may be looked at on the principle that if the enacting words are general, as opposed to specific, or if they are ambiguous, or if there is a real doubt as to the meaning to be given to them, the preamble may have the effect of giving a limited meaning to the general words or resolving the ambiguity. There may be ambiguity in the language used or, without such an ambiguity, there may be a serious doubt as to the meaning, arising from the surrounding circumstances, so that though the words may appear clear and unambiguous, in the light of the surrounding circumstances it is certain that Parliament cannot have intended their apparent meaning. In construing a statute one is entitled to consider the mischief aimed at, but the fundamental rule is to seek to give effect to the intent of the legislature. The old cases from the time of Elizabeth I show many instances where the enacting words have been cut down to give effect to the intention of Parliament, as gleaned from the preamble or the surrounding circumstances. In reading a statute one is entitled to look at the whole of it, including the preamble. If, after one has done so, it appears that the meaning of a particular section is clear beyond a doubt, one must give effect to it. But where any doubt arises, either from the preamble or the surrounding circumstances, the preamble becomes the key to the statute. See also the recent authority, *Pratt* v. *Cook, Son & Co.* (*St. Paul's*) *Ltd.*[25]

As to the suggestion that the effect of the Act of Union of the two Kingdoms of England and Scotland in 1706 (6 Anne, c. 11) was to prevent the naturalization of descendants of the Electress Sophia subsequently born in the lifetime of Queen Anne, and that it impliedly repealed the Act 4 Anne, c. 4, that is not a ground relied on by the appellant. That would be a surprising result. There is nothing in the Act of Union from which that can be implied and nothing in the Act 4 Anne, c. 4, inconsistent with it. The Act of Union does not in terms provide that after the Union all subjects of England and all subjects of Scotland are to be subjects of the United Kingdom, but by article IV of the Treaty set out in the Act that is assumed. By the Act 4 Anne, c. 4, the Electress Sophia and her descendants were in 1705 to be deemed for all purposes natural born English subjects and the effect of the Act of Union was to make what may be called the Royal Family British. The Act of Union must not be treated as repealing all the statutory provisions in England and Scotland providing for either English or Scottish nationality. In view of the expressed objects of the Act 4 Anne, c. 4, it would be remarkable if it were defeated by an Act passed in 1706. Unless pre-Union English nationality law applied after the Union, so as to govern British nationality, there was no law of British nationality at all in existence when the Act of Union took effect; but the Acts of Edward III and James I (already referred to) were regarded as still in force after the Union. Those who under the terms of the Act 4 Anne, c. 4, became English, whether before or after the Union, automatically became citizens of the United Kingdom by virtue of the Act of Union.

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[25] [1940] A.C. 437, 443–446, 447–448; 56 T.L.R. 363; [1940] 1 All E.R. 410.

As to *Macao* v. *Officers of State for Scotland*,[26] that decision did not go so far as to hold that the Act of Union repealed earlier statutes of naturalization in Scotland.

In Queen Anne's time there was no machinery for naturalization other than the introduction of a Bill into Parliament, and in such a case as the present express provision would have to be made to exempt the applicant from the provisions of the statute of James I. This is exemplified in the statute of 1734, 7 Geo. 2, c. 3, an Act for exhibiting a Bill for naturalizing the Prince of Orange, who was marrying a descendant of the Electress Sophia. He did not come under 4 Anne, c. 4, on any interpretation.

Next there is the similar statute of 1763–4, 4 Geo. 3, c. 4, for exhibiting a Bill for naturalizing the Prince of Brunswick Lunenburg. On the respondent's view, he would be within the statute 4 Anne, c. 4, as being a lineal descendant of the Electress Sophia, so that the Act of 1763 was unnecessary, but on the submission of the appellant he was not within that Act, because he was born after the death of Queen Anne.

The Act of 1763–4 can be considered in construing the statute 4 Anne, c. 4: Maxwell on the Interpretation of Statutes, 10th ed., pp. 35–36. It shows that in 1763–4 Parliament took the view that the Prince was not naturalized by the Act of Anne. See also *Kirkness* v. *John Hudson & Co. Ltd.*[27] The construction of the Act of Anne being open to doubt, one is entitled to look at the later Act to see what Parliament thought it had done. There is an ambiguity in the Act of Anne as a whole. As to the historical background of that Act, see the Cambridge Modern History, vol. VI, pp. 11–12.

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[26] (1822) 1 Shaw's App. 138, 139, 141, 142–145, 146, 148, 148–149.

[27] [1955] A.C. 696, 710–712, 725, 735, 738–739; [1955] 2 All E.R. 345.

The respondent's interpretation involves a transposition of the words " in Your Majesty's Life Time " in the Act of Anne. When one sees to whom the word " they " refers, one gets the limitation on the birth. The crucial passage should therefore read: " It is just and highly reasonable that the Princess Sophia . . . " and the issue of her body and all persons lineally descending " from her in Your Majesty's Life Time should be naturalized." The encouragement to become acquainted with the laws and constitutions of the realm really could not operate ad infinitum. As to the Act 4 Anne, c. 1, that confirms the appellant's view of the preamble to the Act 4 Anne, c. 4. Since the first Act is limited to living persons, one gets nearer to that if one limits the second Act to persons born in Queen Anne's life time than if one does not. On this point the reasoning of the Court of Appeal [28] was ill-founded.

" They, in Your Majesty's Life Time " must refer to persons born in Queen Anne's lifetime. The surrounding circumstances support this view of the expressed purpose of the preamble. It was never the purpose of Parliament that the Act should extend in operation throughout the centuries. Its operation must be confined to those living in Queen Anne's reign. Using a racing expression, there was at her death a field of 12 from whom the winner, her successor, must come. No useful purpose would be served by naturalizing all the Electress Sophia's descendants who might become crowned heads in Europe.

The provision made was sensible. At the time the Electress Sophia, the heir to the throne, was 75 years old and the prospect of her surviving Queen Anne was not great. In 1705 one had to consider the prospect of which of her children or grandchildren would in fact prove to be Queen Anne's successor. It might be someone born after 1705 and before 1714. That was the reason for the extension of the Act 4 Anne, c. 4, beyond the Act 4 Anne, c. 1. Further, it was desirable that the children of Queen Anne's successor born before he acceded should be naturalized.

Where there is a doubt as to the intention of Parliament, the preamble to the Act is the key. If there are various meanings to be attached to the enacting words, some wider than the preamble and some not, one takes the intention that accords with the preamble. In construing an Act one reads the whole of it and the preamble is part of the Act. A real doubt exists here because of the preamble.

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[28] [1956] Ch. 188, 204, 213, 217–218; [1955] 3 All E.R. 647.

If, contrary to the appellant's submission, it is necessary to find some generality in the enacting words before one can consider the other parts of the enactment, then there is generality here, because the words "born or hereafter to be born" really mean "all descendants," a phrase as general as "any descendants the "Electress Sophia may have."

R. O. Wilberforce Q.C. and *John Knox* for the respondent. A decision in the respondent's favour would affect a great number of other persons. This action is brought to establish his status. For over 250 years his family have claimed to be British subjects and the claim has not been disputed. When Hanover was overrun by the Prussians in 1866, the Prince of Hanover and his family went to Austria. There is no suggestion that at that time, at any rate, they acquired German nationality, though they may have acquired Austrian nationality. The respondent is in fact the heir male of the Electress Sophia at this time, so, if anyone should be entitled to the benefit of the Act of Anne, it is he.

The claim depends on the construction of a short statute, untechnical in subject-matter and expression and plain in its meaning. The words used aim at a certain result as plainly as any language can. The only difficulty lies in the preamble, which raises two questions: (1) What does it mean? and (2) Does it point so clearly to an intention of Parliament as to impose itself on the enacting part?

The respondent's propositions are: (1) The enacting words are plain and unambiguous. (2) There is no legal or factual context outside the Act in which the words are to be placed which makes them any the less plain and unambiguous or casts doubt on whether they reflect the intention of Parliament. (3) The only evidence of parliamentary intent is in the preamble and that is completely uncertain and inconclusive and is insufficient to restrict words such as are here found in the enacting part; there is no such incongruity between the enacting words and the preamble as to require modification of the former. (4) Questions as to inconvenience or absurdity must be judged as they would appear in 1705 and not at the present time.

If there is any ambiguity here it is obtained by reading the enacting words with something else, either with the preamble or with some surrounding circumstances. Admittedly words must be read in their legal context, even if it is a context outside the Act. But the legal context must be part of a wider structure, and here there is no such context, no system or structure of which these words form part and into which they must be fitted, so that, when so fitted, words which appeared unambiguous become ambiguous.

One may also take into account the facts and circumstances in which the Act was passed, and these may raise doubts whether words, apparently clear, have in fact the meaning attributed to them, but, in such cases, no result can be achieved in the face of words in themselves unambiguous, unless the preamble can be invoked to bring those facts and circumstances into the intent of the Act. Here the words were never ambiguous and the question, therefore, is whether they can nevertheless be restricted by the preamble. In the authorities there is a distinction between statutes where the enacting words are clear and cannot be so controlled and those where they are not clear and can be controlled: *Crespigny* v. *Wittenoom* [29]; *Hughes* v. *Chester and Holyhead Railway Co.*[30]; *Salkeld* v. *Johnson*,[31] and *Powell* v. *Kempton Park Racecourse Co. Ltd.*[32]

Here the words are not general but universal, designedly intended and deliberately drafted to include everything of their kind. They do not leave it open whether there are different kinds, which may or may not be included. They are clear and not general and therefore cannot be restricted by the preamble. They negative any exclusion of a particular kind.

In interpreting a statute one should first read the whole Act and then consider any context, within or without the Act, in which the particular words in question should be read, first the context within the Act (such as other sections) and then the context outside the Act, the legal context, to see whether it provides any cause for limiting or extending the words. As to the preamble, unless it is clear, it provides no manifestation of parliamentary intent. Here the preamble is not clear; it is capable of two meanings. If the mischief to be remedied is stated, that is a great help, but it is a dangerous guide in many cases, because often the legislature states a mischief and the remedy is very much wider, so that one cannot necessarily conclude, because a mischief is stated, that the remedy provided is exactly equivalent to it.

The Act 4 Anne, c. 4, refers first to the heirs of the Electress Sophia and then to her issue and "all persons lineally descending." The enacting words include the expression "born or

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[29] 4 Term Rep. 790.
[30] 1 Dr. & Sm. 524.
[31] 2 Exch. 256.
[32] [1897] 2 Q.B. 242.

"hereafter to be born" and are deliberately designed to include within the class every possible person that the legislature could conceive. If any limitation to the class had been intended, it is inconceivable that that formula would have been used, for the class is stated in an unlimited form: see *Smith* v. *East Elloe Rural District Council*.[33] The terms of this Act show the apparent intention to include as wide a range of persons as possible.

The Act 4 Anne, c. 1, removed the barrier to the naturalization of certain persons created by the Act of James I. No difficulty is created if the barrier was lifted in relation to a person to whom it did not, in any event, apply, because that person was then under 18 years old. The plain purpose of that Act was to remove the barrier in relation to the living issue of the Electress Sophia who were over 18 years old and who, if it had not been passed, would not have been able to qualify because they were beyond the seas. After that, the legislature proceeded with its original intention to naturalize a wider class. The Act focussed on the persons affected by the barrier and was not meant to deal with anyone else. That is as good a way of legislating as if the legislature had described in the first Act the whole class who were ultimately going to be dealt with in the second Act. As, on any view, the legislature in the Act 4 Anne, c. 4, departed from the very limited scope of the first Act, the only question is as to the extent of the departure, and the first Act affords no help in construing the second.

One is not justified in assuming that in the Act 4 Anne, c. 4, the legislature were legislating for the succession at all, that the object of the legislation was to help in securing the Protestant succession to the Throne. The preamble shows that the Act was passed alio intuitu. It was for the benefit of the future Royal Family to introduce them to the customs of the kingdom, since, if nothing were done, they would be foreigners at the death of Queen Anne. It might seem ingenuous, but, looking at the situation in 1705, it was natural to seek to bring them into the British community. If the legislature had been thinking of the successor they would have used the words "heirs of the body." It does not appear that there was in the minds of the legislature any definite limitation to the lifetime of Queen Anne. They may have been thinking of an indefinite period. It is not unreasonable to suppose that they were projecting their thoughts forward for a certain period of time, not counted in hundreds of years but perhaps in fifties. They were looking forward, so far as any legislators do, to the establishment of a new Royal House and were content to legislate as far as they could see. That sort of looking forward to the sort of horizon which legislators can see ahead of them, normally about 50 years, is not an unreasonable intention to impute to Parliament and does not cast on the respondent the onus of suggesting some definite date as being present in the mind of the legislature. If the intention had been simply to ensure that the person who succeeded Queen Anne should be English, that could have been achieved by other words, e.g., those used in the statute 10 Anne, c. 4. What was uppermost in the mind of the legislature was the consideration of the education of the future Royal Family in our laws and customs. The preamble to the Act 4 Anne, c. 4, full of rather fulsome expressions, is not comparable with a "mischief" preamble reciting defects which have to be cured. Every word is not to be read au pied de la lettre.

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[33] [1956] A.C. 736, 767; [1956] 1 All E.R. 855.

This Act was still necessary in 1818 and one cannot impute to Parliament an intention that it should be effective within a certain period, after which it was to become entirely superfluous. In 1818, when the future Queen Victoria was born, there was alive no issue of any son or daughter of George III or any son of George II, and the succession would have gone, but for her birth, to issue of a daughter of George II, who would have been naturalized only by virtue of this Act. Thus, speculations as to when the Act would have become entirely superfluous are precarious. To impute to the legislature a limited intention only for the Act to have effect until Queen Anne's death, which might have happened in five or 40 years, is in the realm of pure speculation. This is supported by the facts of the family of the Electress Sophia. Before 1705 three of her sons had been killed in battle unmarried. Two of her sons living in 1705, Maximilian William and Ernest Augustus, died unmarried. Her daughter, Sophia Charlotte, died in 1705 leaving only one child. The future George II only married in 1705. Thus in 1705 it would have been very precarious to calculate that a certain limited category of the descendants of the Electress Sophia would have been sufficient to secure the succession. In certain contingencies, by no means remote, persons born after the death of Queen Anne would have been brought into the succession very early. It would be reasonable if in this Act all possible successors were intended to be included, leaving it to some future Parliament to deal with any embarrassment which could not then be envisaged.

Up to 1705 naturalization and denization were very freely granted. See, for example, a private Act of Parliament, 4 & 5 Anne, c. 94, in the Long Calendar, whereby 195 persons were naturalized, and also the Act 7 Anne, c. 5. It was not uncommon to naturalize a person and his heirs. Naturalization and denization were not then hedged about with the same restrictions as now, and there is no reason to impute to the Parliament of 1705 a restrictive policy with regard to it. Inconveniences like dual nationality were not considerations which would have been present to the mind of the legislature. The divisions then were not national, but between Protestant and Catholic. With the object of strengthening the Protestant cause it was reasonable that Parliament should have acted generously rather than restrictively towards the future Royal Family.

The words of this Act are the sole indication of what the legislature intended in this case. Whatever interpretation is put on the preamble involves some degree of distortion, but the respondent's involves less than the appellant's. The words " in " Your Majesty's Life Time " refer to the occasion of the passing of the Act, the time at which the thing is done to the persons concerned.

The appellant's construction involves a substantial reconstruction or expansion of the words. If it was intended to limit the class of persons to be benefited, it is inconceivable from a drafting point of view that it was not done by words which described, delineated and marked out the class.

" Naturalized " means having an Act of naturalization passed. The reason for the words " in Your Majesty's Life Time " is that the normal time to legislate would have been after the Queen's death but that, instead of waiting, Parliament was taking action before. Parliament was much preoccupied with what would happen on the Queen's death: see the Act 4 Anne, c. 8. In the old naturalization Acts the word " naturalized " is traditionally used in the preambles and refers to the Act rather than the conferment of naturalization. The words only mean that in the Queen's lifetime an Act of naturalization shall be passed. If the appellant's construction was right, nothing could have been easier than to put the words " in Your Majesty's Life Time " into the enacting part of the Act. The legislature is assumed to have used the clearest way of expressing its intention: Craies on Statute Law, 5th ed., pp. 87–88. There is no indication in the preamble of a legislative intention sufficiently clear to override the enacting words.

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Alternatively, even if there is some manifestation in the preamble of an intent to limit the scope of the Act, the preamble cannot control or limit the enacting words. The authorities bearing on this point fall into several categories. (1) The words used may form part of a context outside the Act, a factual or a legislative or a legal context, which must be brought in to explain them, e.g., words like "any appeals," "any judgment," "any "order" or "any prosecution." (2) Then there are the statutes which on the face of them are passed to correct a particular mischief. In those cases one must consider the mischief, although often, while the mischief is the occasion for some remedy, the legislature passes an enactment in wider terms. It is some guidance to see what the mischief is, particularly when there is some doubt in the enacting part. (3) Then there are the cases where generic words are used covering several things; one may look at the preamble and the antecedents of the Act to see which of the several things is intended. These are cases where the word "any" is used, e.g., "any will" or "any place" or "any "man" or "any goods" or "any river."

The first two categories do not help here. As to the third category, there is a distinction between generic or undefined words, on the one hand, and universal, all-embracing words, on the other, e.g., "all persons," "issue" or "lineal descendants "born or hereafter to be born." Words are universal where the expression is such that it is impossible to ask the question whether there are different kinds of things or persons which may or may not be included.

Where there is no ambiguity in the enacting words, their meaning cannot be altered by the preamble, either by expanding or restricting them: Maxwell on the Interpretation of Statutes, 10th ed., pp. 44–45.

As to the five propositions submitted by the appellant, the real difference between the parties is as to the situation arising when the enacting words are "general."

One must not speculate as to the intention of Parliament: *Lumsden* v. *Inland Revenue Commissioners*.[34] As to the preamble rule, see *Bentley* v. *Rotherham and Kimberworth Local Board of Health* [35]; *Bourne* v. *Keane* [36]; *Stradling* v. *Morgan* [37]; *Stowel* v. *Zouch* [38]; *Eyston* v. *Studd* [39]; *Copeman* v. *Gallant* [40]; *Ryall*

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[34] [1914] A.C. 877, 887, 892; 30 T.L.R. 673.

[35] (1876) 4 Ch.D. 588, 592.

[36] [1919] A.C. 815, 839, 841–842, 870; 35 T.L.R. 560.

[37] 1 Plowd. 199, 201, 203, 204, 205.

[38] 1 Plowd. 353, 355, 356, 360, 361, 365, 368, 369, 375.

[39] 2 Plowd. 463, 464, 468.

[40] 1 P.Wms. 314, 320–321.

v. *Rolle*[41]; *Macc* v. *Cadell*[42]; *Brett* v. *Brett*[43]; *Crespigny* v. *Wittenoom*[44]; *Halton* v. *Cove*[45]; *Salkeld* v. *Johnson*[46]; *Reg.* v. *Bateman*[47]; *Hughes* v. *Chester and Holyhead Railway Co.*[48]; *Caledonian Railway Co.* v. *North British Railway Co.*[49]; *West Ham Churchwardens and Overseers* v. *Iles*[50]; *Yates* v. *The Queen*[51]; *Reg.* v. *Clarence*[52]; *Cox* v. *Hakes*[53]; *Watney, Combe, Reid & Co. Ltd.* v. *Berners*[54]; *The Sussex Peerage Case*[55]; *Powell* v. *Kempton Park Racecourse Co. Ltd.*,[56] and *Pratt* v. *Cook, Son & Co. (St. Paul's) Ltd.*[57]

The conclusion to be drawn from these cases is that if enacting words are plain and unambiguous one does not need to look at the preamble to an Act of Parliament, but if they are not clear and unambiguous one may look at it. One must not create or imagine an ambiguity or search for reasons for doubt. Only if the words are fairly capable of more than one meaning can one look at the preamble to resolve the doubt. Here the enacting words are clear without any limitation of a period. The words "in Your Majesty's Life Time" in the preamble create a problem, but the significance of their presence there must be balanced against the significance of their omission in the enacting words.

Further, there is nothing inherently absurd or inconvenient in providing for the naturalization for an indefinite period of the descendants of a living person. Unless one looks at the matter a posteriori there is nothing in it contrary to any intention that one can ascribe to Parliament in 1705. There is nothing absurd in wishing to encourage those descendants, without specifying a limit, to become acquainted with our laws and constitutions. As to section 2 of the Act, imposing a bar on such descendants as should become Papists, that fits in well with the bar in relation to the succession to the Crown and it is not unreasonable or absurd that it should subsist here.

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[41] 1 Atk. 165, 169, 174, 175, 178–179, 182.

[42] (1774) 1 Cowp. 232, 232–233.

[43] 3 Add. 210, 216–217, 218–220, 221.

[44] 4 Term Rep. 790, 791, 792–793.

[45] 1 B. & Ad. 538, 549, 550, 557, 558.

[46] 2 Exch. 256, 273, 279, 282, 283–284; 1 Mac. & G. 242, 259, 264.

[47] 27 L.J.M.C. 95.

[48] 1 Dr. & Sm. 524, 533, 534, 536, 537, 540, 544, 555; 3 De G.F. & J. 352.

[49] 6 App.Cas. 114, 121, 122, 124, 125, 126, 131–132, 135, 137–138.

[50] 8 App.Cas. 386, 387, 388–389, 392.

[51] 14 Q.B.D. 648, 654, 655, 657, 658, 659, 664–665.

[52] 22 Q.B.D. 23, 65.

[53] 15 App.Cas. 506, 517, 520, 525, 529.

[54] [1915] A.C. 885, 890, 891.

[55] 11 Cl. & Fin. 85, 91, 93, 96, 135, 136, 141, 143, 144, 147.

[56] [1897] 2 Q.B. 242, 255–256, 256–257, 265, 266, 299, 303; [1899] A.C. 143, 176, 184–185, 192–193.

[57] [1940] A.C. 437, 448.

As to absurdity, see Craies on Statute Law, 5th ed., pp. 82–84, and the cases there cited.

Until the Aliens Act, 1844, dealing generally with nationality and naturalization, naturalization was a matter of individual action, Acts conferring the privileges of natural-born British subjects on groups or persons: see Mervyn Jones on British Nationality Law, 1956 ed., p. 64n.

As to the Act of 1763–4, 4 Geo. 3, c. 4, relating to the naturalization of the Prince of Brunswick Lunenburg, it was customary, when persons married into the Royal Family, to pass legislation naturalizing them and also voting them a sum of money. The circumstances of this particular case are related in a letter from Horace Walpole to the Earl of Hertford dated January 22, 1764: Letters of Horace Walpole (Cunningham's edition, 1857), vol. IV, p. 171. This Act may well have been passed for a number of reasons, routine, political or the like, without any great investigation being made into the necessity for it. In any event, it does not profess to interpret the Act of 1705.

Compare the Act of 1763–4 with *Duke of Brunswick* v. *King of Hanover*,[58] where there was no suggestion by the court that the Act of 1705 only applied during Queen Anne's lifetime or that it had expired. Further, the Statute Law Revision Act, 1867, repealed the Act 4 Anne, c. 1, but not 4 Anne, c. 4, and that indicates the view of the legislature that the latter was still in force, whereas the former was obviously temporary. Since the Act of 1867 contained the usual provision for preserving any status already acquired, the Act 4 Anne, c. 4, cannot have been left on the statute book to preserve the position of those naturalized by virtue of it.

The principle approved in *Ormond Investment Co. Ltd.* v. *Betts*[59] is not restricted to technical Finance Acts. Before a subsequent Act can have any effect in the construction of an earlier Act it must be found that the earlier Act is obscure or ambiguous or readily capable of more than one interpretation and that the subsequent Act attaches a certain meaning to words in the earlier Act. But the Act of 1763–4 does not purport to interpret anything. Alternatively, if it is to be regarded as expressing an opinion, it is wrong.

[58] (1844) 6 Beav. 1, 19, 33–34, 34–35.

[59] [1928] A.C. 143, 164–165.

No help in construing the Act 4 Anne, c. 4, can be got either from extraneous circumstances or legislation outside it. There is no reason to impute to Parliament in 1705 any restrictive intention with regard to naturalization. The Act has three characteristics. (1) It is couched in generous language. (2) The preamble is evidently complimentary in character. (3) The enacting part leaves in practically everything in the preamble but adds to it. It was reasonable to encourage the persons described to become acquainted with the laws and constitutions of the realm and reasonable to legislate for that in Queen Anne's lifetime, so that they might have time to do so before she died. The words used were suitable to make the intention plain. Further, it was perfectly proper to say in 1705: "Let us naturalize now all the "issue of the Electress Sophia and her descendants." That is consistent with the crucial word "they" and accords with the other naturalization Acts referred to. The object of encouraging all descendants to become acquainted with the laws and constitutions of the realm could not be accomplished by naturalizing a class limited to those born in Queen Anne's lifetime.

If the preamble had said that it was the intention to naturalize the Electress and all persons descending from her, and the enacting part had said that "in Your Majesty's Life Time the said "persons shall be naturalized," it could not have been held that the enacting words were limited to persons born in her lifetime, for it would be contrary to the intention expressed in the preamble.

Even if the words "in Your Majesty's Life Time" could limit the class of after-born persons, they do not readily fit in with the case of persons living at the date of the Act, its most important objects, since those persons could not be subject to the limitation. On the appellant's submissions there is a conflict produced between the general part of the preamble "all persons lineally "descending" and the limited statement of the class in the second part.

The enacting words are as clear as language can be. This is not a case where the word "any" is used in the enacting words while the preamble points to a definite class, so that it is only necessary to read "any" as "any such." The enacting words indicate that the preamble was not intended to control them.

John Knox following. As to the formalities required in the case of naturalization in the eighteenth century and after, see the Acts to naturalize the Prince of Orange (7 Geo. 2, c. 3), the Prince of Brunswick Lunenburg (4 Geo. 3, c. 4) and Prince Albert (3 & 4 Vict. c. 1). Among general naturalization Acts, 13 Geo. 2,

c. 7, required seven years' residence in any of the American colonies, besides receiving the Sacrament and taking the prescribed oaths; 22 Geo. 2, c. 45, required by section 8 three years' service on board English ships employed in the whale fishery, besides receiving the Sacrament and taking the prescribed oaths; 13 Geo. 2, c. 3, naturalized foreign seamen serving two years in British ships in time of war. The preamble to 14 Geo. 3, c. 84, shows that persons did take advantage of naturalization Acts without becoming permanently resident in this country, though, unless a special dispensation was granted, it would be necessary for them to come here to comply with the requirements of the statute of James I. Technically, there would have to be a connexion with this country, but in practice for most of the eighteenth century that requirement was avoided until 14 Geo. 3, c. 84.

As to the principles of the construction of statutes, see *Bradlaugh* v. *Clarke.*[60]

Sir Reginald Manningham-Buller Q.C., A.-G. in reply. No inference of any value is to be drawn from the omission of 4 Anne, c. 4, from the Statute Law Revision Act, 1867. The Act of 1763–4 is relied on because, where a statute has been accepted as having a certain meaning, the courts, after years have passed, are reluctant to disturb that meaning.

In *Duke of Brunswick* v. *King of Hanover*[61] there is no indication whether or not the Duke's claim to be British by virtue of the Act of Anne was accepted by the court. All the case shows is that the respondent is not the first to make the claim.

As to the meaning of "issue," see Stroud's Judicial Dictionary, 2nd ed., vol. II, pp. 1518–1519, where in paragraph 18 there is a list of instances where it was read as "children," and in paragraph 19 a shorter list of instances where it was read as "descendants." Here the words were intended to apply to the children and grandchildren of the Electress. That is indicated by the first sentence of the Act 4 Anne, c. 1, showing the intention of what was to be done by the Act 4 Anne, c. 4.

In 1705 it was clear that, if the Act of Settlement was not to fail, the successor to Queen Anne must come from the ranks of the descendants of the Electress living at the Queen's death. The longer they had the opportunity of becoming acquainted with the laws and constitutions of the realm, the better. For the purpose in view "heirs of the body" would not do as well as "issue of the body."

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[60] (1883) 8 App.Cas. 354, 362–363.

[61] 6 Beav. 1.

There were obvious reasons for encouraging those alive in 1705 and those born in Queen Anne's lifetime to become acquainted with the laws and constitutions of the realm, but it would not have been reasonable to encourage all descendants of the Electress Sophia, however remote in point of time and however remote from any possibility of succeeding to the Throne. In 1705 it would have seemed needless and absurd to naturalize all descendants.

As to the use of the words "in Your Majesty's Life Time," the respondent's contentions involve a distortion and should be rejected because (1) the passing of the Bill which became 4 Anne, c. 4, itself shows Parliament's view that it was just and reasonable to naturalize at that time; (2) it was unnecessary to make such a recitation as the respondent suggested; (3) Parliament had already declared its intention to naturalize in 4 Anne, c. 1. The words "deemed, taken and esteemed natural born subjects of "England" merely explain what is meant by naturalization. The respondent, born in 1914, does not fit into the words "in "Your Majesty's Life Time." It would be ridiculous to say that he was to be deemed in the lifetime of Queen Anne a natural born subject of England.

It was necessary to make it clear that the Act applied to persons born after as well as before the Act of Anne, since it was unusual to naturalize unborn persons: see *De Geer* v. *Stone*.[62] The reason for the words "born or hereafter to be born" was to emphasize the extension of 4 Anne, c. 4, beyond the express intention of 4 Anne, c. 1. If "whenever born" had been meant, it would have been used; it is much shorter.

The words of the enacting part leave a real doubt whether or not it was Parliament's intention to naturalize all descendants of the Electress Sophia, whenever born. Alternatively, the words used are as general as they could be. There is no distinction between general and universal words. The generality may be cut down to accord with the intention of Parliament ascertained from the surrounding circumstances, the context and the preamble. The courts will restrain the literal or general meaning if it produces absurdity or inconvenience. If the enacting words are clear and capable of only one meaning, the preamble cannot cut them down. But general words are never in that sense absolutely clear.

The courts have never sought to lay down rules as to the order in which the words of a statute should be read. One is entitled to read the whole document. In construing a document one does not have to read bits out of the middle of it first. Having read through the whole document, one must then ask oneself whether the enacting words are clear and specific. It may be that while words like "vacation" or "criminal prosecution" are not ambiguous, taken by themselves, there is a doubt as to the extent of their application. So, even if the enacting words are not ambiguous, the preamble can be looked at if they are phrased in general terms, as they are here.

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[62] (1882) 22 Ch.D. 243.

"Hereafter" only says "after 1705." It gives no indication as to the future extent. It does not mean "ever after," like the end of a fairy story where the lovers live happily ever after.

Their Lordships took time for consideration.

Dec. 5. VISCOUNT SIMONDS. My Lords, the Court of Appeal has declared that H.R.H. Prince Ernest Augustus of Hanover was, immediately before the coming into force of the British Nationality Act, 1948, a British subject and that by virtue of the provisions of that Act he is now a British subject. From this decision, which is said to affect a number of other persons who may or may not want to share the privileges or obligations of that status, the Attorney-General has appealed to your Lordships' House. The question is to be answered upon a consideration of a statute passed just 250 years ago, the statute of 4 Anne, c. 4 of 1705, but before I look at its provisions I will state the relevant facts which are not in dispute.

The respondent is a lineal descendant of Princess Sophia, Electress and Duchess Dowager of Hanover and granddaughter of King James I. He is not a Papist and does not profess the Popish religion—I use the language of the statute in mentioning a fact which is otherwise irrelevant.

Inasmuch as the statute must be regarded as in some measure complementary to the Bill of Rights and the Act of Settlement, it is proper to remind your Lordships that, the little Duke of Gloucester, Queen Anne's son, having died in 1700, the joint effect of those two Acts was that upon the death of Queen Anne without heritable issue, the Crown of England would descend upon the Electress Sophia and the heirs of her body being Protestants. And it is not to be doubted that, though in 1705 the Queen was but 40 years of age, at least the possibility of her early death was not absent from the minds of her subjects, whether they supported the Hanoverian succession or inclined openly or covertly to James Edward, now called "the Old Pretender." In the same year there were living six lineal descendants of the Electress: her eldest son, who became King George I, her second son, Maximilian William, her third son, Ernest Augustus, Duke of York, her grandchildren, the children of George I, George who became George II, and Sophia Dorothea, and her grandson Frederick William, the son of her daughter Sophia Charlotte and Frederick I, King of Prussia.

It is proper, too, to have in mind what was the state of the law in regard to naturalization in the year 1705. By the common law only those persons who were born on English soil were subjects of the English Crown, nor was there, until a much later date, namely, the passing of the Aliens Act, 1844, any general Act enabling aliens to be naturalized. But from early times, apart from denization by letters patent with which we are not here concerned, special Acts of Parliament were passed conferring the status of natural born subjects upon individuals or more or less closely defined classes of individuals. Of the later Acts an example may be found in the statute of 15 Charles 2, c. 15, which enabled all aliens setting up certain specified trades in this country to enjoy all privileges whatsoever as the natural born subjects of the realm. No Act was brought to the notice of the House which purported to confer such status upon persons as yet unborn, whether or not they were born on English soil or took the Oath of Allegiance to the Crown of England.

I will refer to one other aspect of the historical background and I do so because particular reliance was placed upon it by the Attorney-General. By an Act 7 Jac. 1, c. 2 of 1609, entitled " An Act that all such as are to be naturalized, or restored in " Blood, shall first receive the Sacrament of the Lord's Supper, " and the Oath of Allegiance and the Oath of Supremacy," it was provided as follows: " Forasmuch as the Naturalizing of " Strangers, and restoring to Blood Persons attainted, have been " ever reputed Matters of mere Grace and Favour, which are " not fit to be bestowed upon any others than such as are of " the Religion now established in this Realm; Be it therefore " enacted by the King's Most Excellent Majesty, the Lords " Spiritual and Temporal, and the Commons, in this present " Parliament assembled, That no Person or Persons, of what " Quality, Condition, or Place soever, being of the Age of Eighteen " Years or above, shall be naturalized or restored in Blood, unless " the said Person or Persons have received the Sacrament of the " Lord's Supper within One Month next before any Bill exhibited " for that Purpose, and also shall take the Oath of Supremacy,

" and the Oath of Allegiance, in the Parliament House, before " his or her Bill be twice read: And for the better effecting of the " Premises, Be it further enacted by the Authority aforesaid, " That the Lord Chancellor of England, or Lord Keeper of the " Great Seal for the Time being, if the Bill begin in the Upper " House, and the Speaker of the Commons House of Parliament " for the Time being, if the Bill begin there, shall have Authority " at all Times during the Session of Parliament, to minister such " Oath and Oaths, and to such Person or Persons, as by the true " Intent of this Statute is to be ministered. This Act to take " place from and after the End of this present Session of " Parliament."

It was the existence of this Act, whose purpose was plain upon its face, that made it necessary to pass an Act preliminary to that which we have to consider. It was an Act of 4 Anne, c. 1, of 1705, and was entitled: " An Act for exhibiting a Bill in this present " Parliament for naturalizing the Most Excellent Princess Sophia, " Electress and Duchess Dowager of Hanover, and the Issue of " Her Body." I set it out in full:

" An Act for exhibiting a Bill in this present Parliament for " naturalizing the Most Excellent Princess Sophia, Electress and " Duchess Dowager of Hanover, and the Issue of her Body.

" WHEREAS the Most Excellent Princess Sophia, Electress " and Duchess Dowager of Hanover, and the Issue of Her Body, " are to be naturalized, and by reason of their being beyond the " Seas, they cannot qualify themselves in order thereto, according " to the Act made in the seventh Year of the Reign of King " James the First, which requires every Person to receive the " Sacrament of the Lord's Supper, within one Month before any " Bill for Naturalization be exhibited, and also take the Oaths " of Supremacy and Allegiance in the Parliament House, before " His or Her Bill be twice read: Be it enacted by the Queen's " Most Excellent Majesty, by and with the Advice and Consent " of the Lords Spiritual and Temporal, and the Commons, in this " present Parliament assembled, and by the Authority of the " same, That a Bill for the Naturalization of the said Most " Excellent Princess Sophia, Electress and Duchess Dowager of " Hanover, and the Issue of Her Body, shall and may be " exhibited and brought into this present Parliament, and twice " read; any Law, Statute, Matter, or Thing whatsoever to the " contrary notwithstanding."

Two expressions in this Act deserve notice. First, the expression " the Issue of Her Body," that is of the body of the Princess

Sophia, is used once in the title, once in the preamble and once in the enacting part. Secondly, in the preamble the reason for the Act is stated in the words "by reason of their being beyond "the Seas." If it was our task, as it is not, to construe this Act, it might well be that the generality of the words "Issue of Her "Body" would be held to be limited to those who were at the date of the Act "beyond the Seas" and not to include persons then unborn. Upon this I express no opinion, for, whatever might be the intention of Parliament to be gleaned from the earlier Act, it is clear that a different and wider intention inspired the later one and it is only from the consideration of its language that it can be determined how different and how much wider was its intention.

So I come to the statute 4 Anne, c. 4, and for convenience set it out in full:

[His Lordship read the Act and continued:] The Act having been set out in full, the rival contentions may now be stated. For the respondent it is contended that he is a person answering to the description issue of the body of the Princess Sophia, a person lineally descending from her and "hereafter born," that is, born after the passing of the Act, and that he is therefore within the scope of the enacting provision and is entitled to be deemed, taken and esteemed a "natural born "subject of this Kingdom." It cannot be denied that this contention accords with the prima facie meaning of the enacting words. For the Attorney-General, on the other hand, it was contended that the generality of those words must be restricted to persons born in the lifetime of Queen Anne, such a restriction being imposed as a matter of construction of the statute by a consideration of the context in which the words were found. And by "context" he meant both the historical and political background to which I have referred and the state of the relevant law as well as the verbal context of the Act itself, including its preamble. In particular he relied on the purpose of the Act as stated in the preamble that the persons to be naturalized should be encouraged to become acquainted with the laws and constitutions of the Realm and, most strongly, on the conjunction (also in the preamble) of the words "they" and "in Your Majesty's "Life Time." Here, it was urged, was an expression of the intent of Parliament clear enough to restrict the generality of the enacting words.

My Lords, the contention of the Attorney-General was, in the first place, met by the bald general proposition that where the enacting part of a statute is clear and unambiguous, it cannot be cut down by the preamble, and a large part of the time which the hearing of this case occupied was spent in discussing authorities which were said to support that proposition. I wish at the outset to express my dissent from it, if it means that I cannot obtain assistance from the preamble in ascertaining the meaning of the relevant enacting part. For words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use "context" in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy.

Since a large and ever-increasing amount of the time of the courts has, during the last three hundred years, been spent in the interpretation and exposition of statutes, it is natural enough that in a matter so complex the guiding principles should be stated in different language and with such varying emphasis on different aspects of the problem that support of high authority may be found for general and apparently irreconcilable propositions. I shall endeavour not to add to their number, though I must admit to a consciousness of inadequacy if I am invited to interpret any part of any statute without a knowledge of its context in the fullest sense of that word.

An important branch of the Attorney-General's argument rested on the alleged absurdity and inconvenience which must result if no restriction is imposed on the general words—a result, he said, which must be presumed to have been foreseen in 1705. This is dangerous ground. A double assumption is made, the first, that Parliament foresaw the possibility of what has in fact happened, the second, that foreseeing it they would have thought it inconvenient or absurd. On the Attorney-General's own interpretation, in addition to the six descendants of the Princess Sophia, including the Crown Prince of Prussia, living at the date of the Act, an unknown number might be born in the lifetime of Queen Anne who would be naturalized under it. However absurd we today may think an interpretation which would lead to most of the Royal families of Europe being British subjects, I cannot say that in 1705 there was such manifest absurdity as to entitle one to reject it. Nor can I say that in those years of religious, dynastic and political conflict Parliament would not have enacted it at the risk of its seeming absurd. Nor do I see any reason for limiting the general words to persons who upon the Queen's death would, under the Act of Settlement, immediately succeed to the throne of England.

I reject, therefore, the argument in favour of restricting the meaning of the enacting words so far as it is based on any other consideration than that of the words of the statute itself. I turn, then, to the preamble. As I have already said, apart from the reason for the statute which is there stated, the argument rests on nothing more than the conjunction of the words "they" and "in Your Majesty's Life Time." It is urged that only those could be naturalized in Queen Anne's lifetime who were born in her lifetime, and this is a self-evident proposition, at least, if the word "naturalized" means the same thing as the words which follow—"and be deemed, taken and esteemed natural born "subjects of England." But, my Lords, before I reach these words I have already learned from the earlier part of the preamble that I am concerned with the Princess Sophia and the issue of her body and all persons lineally descending from her. I know that at least some persons then unborn are to be naturalized by the Act and I proceed to the enacting part with a doubt already implanted in my mind that the expression "they, "in Your Majesty's life time . . . should be naturalized" is a clumsy one which may mean no more than that "an Act should "be passed in Your Majesty's Life Time for naturalizing them." I read on and find not only the same general words repeated but emphasis lent to them by the addition of the words "born or "hereafter to be born." Nor can I ignore that the omission of any restricting words is of great significance. Now, I do not suggest that it is impossible that words of this generality should be restricted by their context. But if I may do so without adding to the number of conflicting generalizations, I would say that for such restriction a compelling reason must be found. Perhaps an obvious example may be found outside an Act in a principle of comity which confines its operation within the territorial jurisdiction of the enacting State: or it may be found in a repugnancy between the immediate enacting provisions and other provisions of the same Act. But where it is in the preamble that the reason for restriction is to be found, the difficulty is far greater. For, as has so often been said, Parliament may well intend the remedy to extend beyond the immediate mischief: the single fact therefore that the enacting words are more general than the preamble

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would suggest is not enough. Something more is needed, and here lies the heart of the problem. On the one hand, the proposition can be accepted that " it is a settled rule that the preamble " cannot be made use of to control the enactments themselves " where they are expressed in clear and unambiguous terms." [1] I quote the words of Chitty L.J., which were cordially approved by Lord Davey in *Powell* v. *Kempton Park Racecourse Co. Ltd.*[2] On the other hand, it must often be difficult to say that any terms are clear and unambiguous until they have been studied in their context. That is not to say that the warning is to be disregarded against creating or imagining an ambiguity in order to bring in the aid of the preamble. It means only that the elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he had read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous. To say, then, that you may not call in aid the preamble in order to create an ambiguity in effect means very little, and, with great respect to those who have from time to time invoked this rule, I would suggest that it is better stated by saying that the context of the preamble is not to influence the meaning otherwise ascribable to the enacting part unless there is a compelling reason for it. And I do not propose to define that expression except negatively by saying (as I have said before) that it is not to be found merely in the fact that the enacting words go further than the preamble has indicated. Still less can the preamble affect the meaning of the enacting words when its own meaning is in doubt.

With these principles, if they can be called principles, in mind, I turn once more to the statute we have to consider and I find, first, that it is only the narrower scope of the objective as stated in the preamble which is relied on to restrict the emphatic generality of the enacting words, and secondly, that it is at least a matter of doubt what is the scope of the preamble itself. For, as I have already indicated, the clumsy phrase " they, in Your " Majesty's life time . . . should be naturalized " is susceptible of meaning that an Act should be passed in the lifetime of the Queen for the naturalization of her descendants born and unborn. In these circumstances I must reject also the argument of the Attorney-General which is based on the context of the preamble and give to the enacting words " the issue of her body and all

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[1] [1897] 2 Q.B. 242, 299; 13 T.L.R. 281.

[2] [1899] A.C. 143, 185; 15 T.L.R. 266.

"persons lineally descending from her, born or hereafter to be "born" their prima facie and literal meaning.

I ought to mention, because the Attorney-General attached a modest weight to it, an Act of the fourth year of George III, whereby the then Prince of Brunswick Luneburg was naturalized as a British subject. He was in fact a lineal descendant of the Princess Sophia and the Act was unnecessary if the respondent's construction of the Act of 4 Anne is right, for he was already a British subject. But I cannot allow this matter to weigh with me at all. I do not know why the Act was passed, whether because the earlier Act had, after 60 years, been forgotten, or because a doubt had been expressed and ex majore cautela it was desired to pass a special Act, or because Parliament flatly misinterpreted the earlier Act. I cannot regard it as a legislative interpretation of the earlier Act operating to give it a meaning which it would not otherwise bear.

Finally, I must refer to a question which has caused me some embarrassment. It is natural that this case, with its striking and unusual features, should arouse much public interest, and it happens that in the consequent discussion of it a point has been taken which was not debated in the courts below. It is that, whatever might have been the result if the question remained as it was before the union of England and Scotland, an Act of the English Parliament passed in the year 1705 could not be effective to confer the status of a British subject upon a person born on foreign soil after the Act of Union. This point, which I state, perhaps badly and imperfectly, I thought it right to bring to the notice of the Attorney-General and of counsel for the respondent. The Attorney-General, having considered the point, came to the conclusion that it was not a good one. He briefly explained his reasons and, in effect, declined, as he was well entitled to do, to press it on your Lordships. In those circumstances it was clearly not possible to pursue the matter further and counsel for the respondent was not invited to deal with it. There it must rest. The House makes no pronouncement upon it.

In the result, I am of opinion that the appeal should be dismissed and I move your Lordships accordingly.

Lord Normand. My Lords, the only question for adjudication in this appeal is whether the effect of the Act 4 Anne, c. 4, was to naturalize, subject to the exclusion provided for by the second section, those children and lineal descendants of the Electress Sophia who were alive at the passing of the Act and those who were born thereafter but before the death of Queen Anne, or whether the effect was to naturalize, subject to the same exclusion, all persons lineally descending from the Electress alive at the passing of the Act or born at any time thereafter. The question is one of interpretation, and it is not in doubt that the Act must be construed as it would have been construed immediately after it became law.

The Act itself and the related Acts, 7 Jac. 1, c. 2 and 4 Anne, c. 1, have already been brought sufficiently to the notice of the House, and I need not recite them here. On either of the constructions put forward, the effect of the Act, both intended and actual, was to confer the privileges and obligations of naturalization on persons neither resident within nor expected to reside within the realm without their having any voice on the matter and without requiring that they should take the Oath of Allegiance. On the other hand, naturalization was conferred only on persons who might in conceivable circumstances succeed to the throne under the Act of Settlement. The Act is unique in these respects and the scope of its operation must not, in my opinion, be extended beyond those who are manifestly covered by the enacting words.

In order to discover the intention of Parliament it is proper that the court should read the whole Act, inform itself of the legal context of the Act, including Acts so related to it that they may throw light upon its meaning, and of the factual context, such as the mischief to be remedied, and those circumstances which Parliament had in view, including in this case the death of the last of Queen Anne's children and the state of the family of the Princess Sophia. It is the merest commonplace to say that words abstracted from context may be meaningless or misleading.

The issue in the appeal is whether the words "the issue of her "body, and all persons lineally descending from her, born or "hereafter to be born" are capable of suffering a limitation of time which might have been expressed by adding to them such words as "during the life of Queen Anne." The issue may be more closely defined. Much of the argument of the Attorney-General rested on the basis that the enacting words were general and that general words are more susceptible of control by context than specific words, and he cited authorities in support of this proposition. If the words in the present case had been "the "issue of her body, and all persons lineally descending from her" alone, the authorities which the Attorney-General referred to would have been material. Here, however, it is the words qualifying these general words by reference to the time of birth that are important, and it is their meaning that we have to ascertain.

Before attempting to solve this question, it will be proper to consider the reasons, derived from the context of attendant circumstances or of law, which on the Attorney-General's argument are relevant to influence the construction of the enacting words. The Attorney-General maintained that the naturalizing of all future descendants of the Princess Sophia was inherently so absurd that Parliament cannot be supposed to have intended it. I can dispose of this point at once by saying that I agree with the observations upon it of Romer L.J. in the Court of Appeal. The Attorney-General then relied on the terms of the Act 4 Anne, c. 1, which paved the way for the Act now under construction, and provided for the introduction of a Bill naturalizing the Princess Sophia and the issue of her body alive at its date only. I think that the Act 4 Anne, c. 1, does not assist the Attorney-General, for the reasons stated by Romer L.J. The lack of issue of Queen Anne and the state of the family of the Princess Sophia throw no light on construction. It is true that if the Act naturalized only those descendants born before Queen Anne's death, the successor to Queen Anne and the successor to her successor would probably have been among those naturalized, but Parliament might well have intended to go further and to naturalize all who under the Act of Settlement might in certain events, probable or not, succeed to the throne.

The Attorney-General placed the main weight of his argument on the preamble of the Act 4 Anne, c. 4. The preamble is, however, itself in need of construction. After a reference to the Act of Settlement and some compliments addressed to Queen Anne it continues "and to the end the said Princess Sophia . . . "and the issue of her body, and all persons lineally descending "from her, may be encouraged to become acquainted with the "laws and constitutions of this realm, it is just and highly reason- "able, that they, in your Majesty's life time . . . should be "naturalized, and be deemed, taken, and esteemed natural-born "subjects of England." It is to be noted that the parties agreed that the sentence beginning "and be deemed" and ending with "subjects of England" is merely a description in common form of the status conferred by naturalization. The important words are "they, in Your Majesty's life time should be naturalized." These words seem on the face of them to be a clumsy inversion of the words "They should be naturalized in Your Majesty's life "time," and so far there is nothing to suggest that "naturalized" has not its ordinary meaning, viz., "admitted to the rights of a "natural born subject." Such an interpretation receives some support from the expressed motive that the persons to be naturalized would be encouraged to become acquainted with the laws and constitutions of the realm. This would be a not unreasonable expectation for a limited time and a limited number of persons, but it is scarcely probable that Parliament should expect all future descendants of the Princess Sophia, however remote from any prospect of succeeding to the throne, to be encouraged to apply themselves to the study of English laws and constitutions. The respondent's suggestions that the words "in Your Majesty's "life time" merely mean "now" and that "naturalized" means "have an Act passed providing for their naturalization" or the like, do considerable violence to the language used by Parliament. Moreover, the word "now," if it were substituted, would be otiose, and the words "and be deemed," etc., fit "naturalized" if it is used in its ordinary sense, but are awkward if "naturalized" is given the meaning which the respondent would ascribe to it. I would therefore provisionally accept the construction of the preamble put forward by the Attorney-General, always bearing in mind that the preamble is part of the statute, and that no part of a statute can be regarded as independent of the rest.

When there is a preamble it is generally in its recitals that the mischief to be remedied and the scope of the Act are described. It is therefore clearly permissible to have recourse to it as an aid to construing the enacting provisions. The preamble is not, however, of the same weight as an aid to construction of a section of the Act as are other relevant enacting words to be found elsewhere in the Act or even in related Acts. There may be no exact correspondence between preamble and enactment, and the enactment may go beyond, or it may fall short of the indications that may be gathered from the preamble. Again, the preamble cannot be of much or any assistance in construing provisions which embody qualifications or exceptions from the operation of the general purpose of the Act. It is only when it conveys a clear and definite meaning in comparison with relatively obscure or indefinite enacting words that the preamble may legitimately prevail. The courts are concerned with the practical business of deciding a *lis*, and when the plaintiff puts forward one construction of an enactment and the defendant another, it is the court's business in any case of some difficulty, after informing itself of what I have called the legal and factual context including the preamble, to consider in the light of this knowledge whether the enacting words admit of both the rival constructions put forward. If they admit of only one construction, that construction will receive effect even if it is inconsistent with the preamble, but if the enacting words are capable of either of the constructions offered by the parties, the construction which fits the preamble may be preferred.

Now, I am of opinion that we have in the present instance a simple case where the enacting words are capable of the respondent's construction and not reasonably capable of the appellant's construction. The question is whether the words "all persons "lineally descending from her" (the Princess Sophia) "born or "hereafter to be born" can reasonably be construed as subject to a limitation of time, such as the date of Queen Anne's death. Though it may be an exaggeration to say that no words can be conceived more apt to exclude such a limitation, they are clear enough. I find it difficult to think that if a limitation to the life of Queen Anne had been intended it would not have been expressed. The words "born or hereafter to be born" appear here for the first time with the evident purpose of clarifying the descriptive words "all persons lineally descending from her." Unless "hereafter" means "at any time hereafter" the words "born or hereafter "to be born" have no clarifying effect whatever and would be better omitted. If they are to receive any effect they are in the absence of compelling context inconsistent with any terminus ad quem short of the failure of all descendants. The words are not only clear, they are also direct, whereas it is only by inference that the preamble seems to limit the operation of the Act to those born before Queen Anne's death. There is no clumsiness in the wording to raise a doubt whether they mean what they seem to mean. Nothing but the most compelling context would justify a construction radically altering the plain meaning of the enacting words by reading into them a qualification such as "in "Her Majesty's life time." The preamble has no such compulsive force. It may be possible to read the preamble in the sense put forward on behalf of the respondent, or it may be said that the enacting words go beyond the preamble. For the purposes of the present case it matters not which.

I am therefore of opinion that the appeal should be dismissed. I agree with what my noble and learned friend on the Woolsack has said on the possible bearing of the Act of Union on the operation of the Act 4 Anne, c. 4, and I express no opinion upon it.

LORD MORTON OF HENRYTON. My Lords, only one question arises on this appeal; what is the meaning of a few words in the enacting portion of the short statute 4 Anne, c. 4, of 1705. These words are: "Be it enacted . . . that the said Princess "Sophia, Electress and Duchess Dowager of Hanover, and the "issue of her body, and all persons lineally descending from her, "born or hereafter to be born, be and shall be, to all intents and "purposes whatsoever, deemed, taken, and esteemed natural-born "subjects of this Kingdom, as if the said Princess, and the issue "of her body, and all persons lineally descending from her, born "or hereafter to be born, had been born within this realm of "England."

The argument centres round the words, twice repeated, "the "issue of her body, and all persons lineally descending from "her, born or hereafter to be born." My Lords, these words, standing by themselves, are surely capable of only one meaning. They include everyone, whenever born, who is a lineal descendant of the Princess Sophia. This was recognized by Vaisey J. and by all the members of the Court of Appeal. Vaisey J.[3] referred to these words as "the apparently clear and unambiguous terms of the enacting provisions of the Act of Anne," and later referred to them[4] as "unqualified and plain in their "meaning, when standing alone." The Attorney-General, however, contended that the class described in these words is limited to persons born within the lifetime of Queen Anne, who died only nine years after the Act was passed. He relied principally upon the words of the preamble to the Act, which have already been read, but he also placed some reliance upon the statute 4 Anne, c. 1, of 1705. He further contended that the construction put forward on behalf of the respondent led to an absurd result.

Other matters mentioned by the Attorney-General did not, I think, impress your Lordships, and I do not find it necessary to refer to them.

My Lords, to my mind the Attorney-General is faced, at the outset, with one great difficulty. His argument really amounts to an invitation to your Lordships to perform a surgical operation on the enacting part of the statute by inserting, immediately after the words "born or hereafter to be born" the words "in "Your Majesty's life time." Now, if the legislature had intended to limit the class of persons to be naturalized, I can think of no reason why these words should not have been inserted. These very words, "in Your Majesty's life time," had already been used in the preamble, immediately before the enacting part, and it would have been the most natural thing in the world to repeat them in the enacting part, if the legislature had intended so to limit the class. Instead of so doing, the legislature gave a strong indication of a contrary intention. We find in the preamble a reference to "the said Princess Sophia . . . and the issue of her "body, and all persons lineally descending from her"; and in the enacting part, a few lines later, the same words are repeated with the addition of the words "born or hereafter to be born."

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[3] [1955] Ch. 440, 444; [1955] 1 All E.R. 746.

[4] [1955] Ch. 440, 451.

Surely, my Lords, these words can only have been added in order to make it abundantly clear that all descendants of the Princess Sophia, whenever born, were to be naturalized. In the face of these words, I find it hard to imagine any context, or any circumstances, which should persuade your Lordships to perform the surgical operation already mentioned, and the matters upon which the Attorney-General relied fall far short of persuading me to perform it. I turn first to his submission based upon the following words in the preamble: "And to the end the said "Princess Sophia, Electress and Duchess Dowager of Hanover, "and the issue of her body, and all persons lineally descending "from her, may be encouraged to become acquainted with the "laws and constitutions of this realm, it is just and highly "reasonable, that they, in Your Majesty's life time (whom "God long preserve) should be naturalized, and be deemed, "taken, and esteemed natural-born subjects of England." The Attorney-General submitted that these words show the intention of Parliament that only those descendants of the Princess Sophia who were born in the lifetime of Queen Anne were to be naturalized. My Lords, I do not so read the words. I think that the words "that they, in Your Majesty's life time . . . should "be naturalized," etc. do not operate to limit the class but merely state the view that the naturalization should be effected by an Act passed in Queen Anne's lifetime. This is, to my mind, a more natural meaning of the words and I do not think it is necessary to make any addition to, or transposition of, the words used in order to give them that meaning. Moreover, there are, I think, some strong objections to the construction for which the Attorney-General contends. In the first place, it would be strange indeed if Parliament, having already stated its object to be that the issue of the body of the Princess Sophia and all persons lineally descending from her should be encouraged to become acquainted with the laws and constitutions of England, should immediately go on to limit the class of persons to be naturalized, for this very purpose, to persons born in the lifetime of Queen Anne. Secondly, if this passage had been intended to bear the meaning attributed to it by the Attorney-General, surely the words "in Your Majesty's Life Time" would have been linked with the description of the class and not with the words "should be naturalized." The Attorney-General sought to gain support from the words "and be deemed, taken and esteemed "natural born subjects of England," but it seems to me that these words merely state the effect of naturalization.

I would not venture to say, my Lords, that the construction of the preamble which appeals to me is the only possible construction, but it seems to me equally impossible to say that the construction for which the Attorney-General contends is the only possible construction. The preamble is, to put it at its highest in favour of the Attorney-General, an ambiguous document, and as such it cannot in any way control the words of the enacting part. In fact, if the preamble were clear one way and the enacting part were equally clear the other way, there can be no doubt that the latter must prevail.

The argument based on the Act 4 Anne, c. 1, of 1705 is to this effect. This Act only refers to persons living at the time when it was enacted. This is shown by the words "by reason "of their being beyond the seas," since no person could be beyond the seas unless he or she were alive. This was the Act which paved the way to the Act now under consideration, and your Lordships should place some limit as to time of birth upon the class of persons covered by the latter Act. My Lords, I can find no force in this argument. It is clear, from any view of the preamble to the latter Act, that it extended at least to persons who came into existence between the passing of the Act and the death of Queen Anne, and I would adopt the words of Romer L.J. in the Court of Appeal[5]: ". . . as, on any view, "the legislature departed in the second Act from the very limited "scope which was envisaged by the recital in the first, the only "question, as it seems to me, is as to the extent of such depar- "ture. I therefore find no assistance, in construing the second "Act, from the language of the first."

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[5] [1956] Ch. 188, 218; sub nom. *H.R.H. Prince Ernest Augustus of Hanover* v. *Attorney-General* [1955] 3 All E.R. 647.

As to the argument that the enacting words are absurdly wide in their scope if they are given their natural meaning, it must be borne in mind that the matter must be viewed from the standpoint of those who were legislating in the year 1705, and I would again quote from the judgment of Romer L.J.[5]: "I see "nothing necessarily or inherently absurd in the conception that "Parliament was intending to provide in 1705 that all those "upon whom the British Crown might subsequently devolve by "virtue of the Act of Settlement should become British citizens "at birth; and Parliament was presumably alive to the fact that, "if the class of persons affected by the Act should become "eventually too large, it could be closed by subsequent legislation. It appears to me that a far greater degree of absurdity "than that which has been suggested in this case is required to "justify the court in departing from clear enacting language, "assuming that absurdity does, in itself, afford ground for any "such departure."

If the enacting words are to bear their natural meaning the respondent must succeed, for it is admitted that he is a lineal descendant of the Electress Sophia and that he is and at all times has been a Protestant, so that he is not excluded by the proviso to the Act now under consideration.

In my view, the Court of Appeal arrived at the correct conclusion and this appeal should be dismissed.

I agree with the observations of my noble and learned friend on the Woolsack as to the Act of Union.

LORD TUCKER. My Lords, I am in complete agreement with the opinion that has been delivered by my noble and learned friend on the Woolsack and have nothing to add thereto.

LORD SOMERVELL OF HARROW. My Lords, your Lordships were referred to a number of statements in speeches or judgments dealing with the construction of statutes.

There are, I think, two distinct subject-matters dealt with in the passages to which reference was made. In the first place, it was necessary to decide what can or cannot be invoked and relied on by either party in support of its case outside the words of the Act itself. It seems now clear that the "intent of the Parliament "which passed the Act" is not to be gathered from the parliamentary history of the statute. The mischief against which the

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[5] [1956] Ch. 188, 218.

Act is directed and perhaps, though to an undefined extent, the surrounding circumstances can be considered. Other statutes in pari materia and the state of the law at the time are admissible. "Subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation: but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier." (Lord Sterndale in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners*,[6] cited and approved by Lord Buckmaster in *Ormond Investment Co. Ltd.* v. *Betts*.[7])

These are properly called rules. They apply in all cases to determine what can and cannot be referred to and relied on. The above list is not intended to be either exhaustive or precise but to mark the distinction between rules as to admissibility and the solution of the problems which arise when one turns to the actual words of the Act.

A question of construction arises when one side submits that a particular provision of an Act covers the facts of the case and the other side submits that it does not. Or it may be agreed it applies, but the difference arises as to its application. It is unreal to proceed as if the court looked first at the provision in dispute without knowing whether it was contained in a Finance Act or a Public Health Act. The title and the general scope of the Act constitute the background of the contest. When a court comes to the Act itself, bearing in mind any relevant extraneous matters, there is, in my opinion, one compelling rule. The whole or any part of the Act may be referred to and relied on. It is, I hope, not disrespectful to regret that the subject was not left where Sir John Nicholl left it in 1826. "The key to the opening of every law is the reason and spirit of the law—it is the 'animus imponentis,' the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed, detached from its context in the statute: it is to be viewed in connexion with its whole context—meaning by this as well the title and preamble as the purview or enacting part of the statute." (Sir John Nicholl in *Brett* v. *Brett*.[8] He proceeds in the next sentence to attach in that case special importance to the preamble. We were referred to other statements minimizing the importance of the preamble. For example, Buller J. in *Crespigny* v. *Wittenoom* [9]): "I agree that "the preamble cannot control the enacting part of a statute, "which is expressed in clear and unambiguous terms. But if "any doubt arise on the words of the enacting part, the preamble "may be resorted to, to explain it."

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[6] [1921] 2 K.B. 403, 414; 37 T.L.R. 402

[7] [1928] A.C. 143, 156.

[8] (1826) 3 Add. 210, 216.

The word "unambiguous" must mean unambiguous in their context. The words "a marriage" are not ex facie ambiguous. In one statutory context they mean a marriage celebrated in England and in another a marriage wherever celebrated. Many local Acts have their geographical limits set out in their preambles and title. I take an example at random: 8 & 9 Vict. c. 22, is "An Act to enable the Commissioners of Greenwich Hospital to "widen and improve Fisher Lane, in Greenwich." If that Act had contained in the enacting provisions words which in isolation might have applied outside Greenwich, the preamble would control their meaning.

If, however, having read the Act as a whole, including the preamble, the enacting words clearly negative the construction which it is sought to support by the preamble, that is an end of it.

It is also said that the court cannot look at a preamble to find an ambiguity. Lord Davey's statement in *Powell* v. *Kempton Park Racecourse Co. Ltd.*[10] is relied on. He said "that you "must not create or imagine an ambiguity in order to bring in "the aid of the preamble." I find it difficult to believe that Lord Davey was intending to create an exception to the rule that an Act, like other documents, must be considered as a whole.

Preambles differ in their scope and consequently in the weight, if any, which they may have on one side or the other of a dispute. There can be no rule. If in an Act the preamble is a general and brief statement of the main purpose, it may well be of little, if any, value. The Act may, as has been said, go beyond or, in some respects, fall short of the purpose so briefly stated. Most Acts contain exceptions to their main purpose, on the meaning of which such a preamble would presumably throw no light. On the other hand, some general and most local Acts have their limits set out in some detail. I will not hazard an example, but there may well be cases in which a section, read with the preamble, may have a meaning different from that which it would have if there were no preamble. A court will, of course,

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[9] (1792) 4 Term Rep. 790, 793.

[10] [1899] A.C. 143, 185.

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always bear in mind that a preamble is not an enacting provision, but I think it must have such weight as it can support in all contests as to construction.

Coming to the Act, I therefore accept the appellant's submission that the preamble and enacting words should be read before deciding whether the latter are reasonably capable of the meaning which the appellant seeks to place upon them. I do not think they are. The words "all persons lineally descending "from her, born or hereafter to be born," in my opinion, clearly negative any intention to limit the effect of the Act to those born in Queen Anne's lifetime. Whether the words are regarded as general or specific, they could not have been used if the Act was to be limited to those born in Queen Anne's lifetime.

The preamble is perhaps ambiguous, but the phrasing would, I think, have been different if the intention had been that submitted by the appellant. If one goes through the words, having in mind an intention of naturalizing, in addition to those now living, only those future descendants born in Queen Anne's lifetime, the words "all persons lineally descending from her" would clearly have been so qualified. Instead of the word "they" one would have had some such words as "those now living and those "born hereafter in Your Majesty's lifetime." There is also, I think, force in the argument for the respondent that "naturalized" refers to the Act of Parliament, and the later words express its effect. This is supported by the fact that the word "naturalized" does not occur in the enacting words. It is sufficient if the preamble is ambiguous. On consideration, I am clear that it does not bear the meaning submitted by the appellant.

I have nothing I wish to add on the other points raised and I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Treasury Solicitor; Farrer & Co.*

F. C.

J. C.*

1957
May 1;
June 18.

TAMESHWAR AND ANOTHER . . . . APPELLANTS;

AND

THE QUEEN . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL IN THE SUPREME COURT OF BRITISH GUIANA.

British Guiana—Criminal law—View by jury with witnesses—Judge absent—Fatal defect in trial—Robbery—Convictions quashed—Criminal Law (Procedure) Ordinance (Laws of British Guiana, 1953, *c.* 11), *s.* 45.

Criminal Law—Practice—Trial—View by jury of locus in quo—View with witnesses—Absence of judge—Fatal defect in trial. Evidence.

A view at which witnesses give demonstrations or answer questions is part of the trial and part of the evidence in the case and must be held in the presence of the judge and the jury. The absence of the judge at such a view is a fatal defect in the trial; but this is not so in the case of a simple view by the jury without witnesses.

At the end of the evidence taken in court on the trial of the appellants in British Guiana on a charge of robbery with aggravation the judge directed a view by the jury of the scene of the robbery. It was attended by the accused, by counsel for the prosecution and by counsel for one of the accused, and by a number of prosecution witnesses, but the judge was absent. The witnesses pointed out particular places which had been mentioned in their evidence and demonstrated what had happened. There was no suggestion of impropriety or irregularity on the part of the jury or witnesses or anybody else at the view. The appellants were found guilty of the offence charged. On appeal:—

Held, that the absence of the judge during part of the trial—the view—was such a departure from the essential principles of justice that the trial could not be allowed to stand, and the convictions must be quashed. The judge could only properly sum up if he had heard all the evidence and seen all the demonstrations by witnesses.

Section 45 of the Criminal Law (Procedure) Ordinance (c. 11 of the Laws of British Guiana, 1953), which makes provision for a view "upon the terms and conditions to the court or the judge "seeming proper," extends to cover a view when witnesses are present and demonstrate where they stood, and enables the court or a judge to determine "the terms and conditions" on which the view may be held, but that power must be exercised in accordance with the fundamental principles of a fair trial, one of which is that every piece of evidence given by a witness must be given in the presence of the tribunal—the judge and jury—which tries the case.

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* *Present*: EARL JOWITT, LORD TUCKER and LORD DENNING.

Karamat v. *The Queen* [1956] A.C. 256; [1956] 1 All E.R. 415 applied.

Reg. v. *Martin and Webb* (1872) L.R. 1 C.C.R. 378; 26 L.T. 778 considered.

Judgment of the Court of Criminal Appeal of British Guiana reversed.

APPEAL (No. 25 of 1956), by special leave in forma pauperis, from a judgment of the Court of Criminal Appeal of British Guiana (Holder C.J. and Phillips J., Stoby J. dissenting) (April 4, 1956), which had dismissed the present appellants' appeals from a judgment of the Supreme Court of British Guiana (Miller Ag.J. and a jury) (February 17, 1955), whereby they had been convicted of robbery with aggravation and had each been sentenced to 10 years' penal servitude and six strokes by flogging. The flogging had not been carried out.

The following material facts are taken from the judgment of the Judicial Committee: At about 7.15 in the morning of February 25, 1954, a postal apprentice named Sherry Browne, aged 19, was entrusted with a bag containing $13,129.68 to carry to the Nigg Post Office. He was cycling towards the post office when two men stopped him at a bridge and pulled him off his cycle. One had a gun and the other a cutlass. They took the bag of dollars and ran away with it. It had never been recovered.

Two men named Tameshwar and Seokumar were arrested and charged with the offence. At the trial Tameshwar was called accused "No. 1" and Seokumar accused "No. 2," and it is convenient here to do the same. Sherry Browne gave evidence of the robbery and identified accused Nos. 1 and 2 as his assailants. A boy scout, aged 12, gave evidence that he saw two men running away and identified them as accused Nos. 1 and 2. A barber said he saw two men running away and identified accused No. 2 as one of them. A young married woman said that she saw accused No. 1 running with a bag over his shoulder. So did a carpenter. A police sergeant named Adams gave evidence of statements made by the two accused after they were arrested. Both, in their first statements, said they were not at the place at all; but accused No. 2 afterwards made a second statement in which he said they were both there but he himself took no part in the actual robbery. He said: "Me get frighten and me run pon Nigg dam "behind Tameshwar . . . Ah run behind Tameshwar and meself "and them been ah shouting 'Hold he, hold he.'" Later accused No. 2 withdrew this second statement and said it was obtained from him by threats. The defence of each of them was an alibi. Accused No. 1 said he was in a boat going to the rice field. Accused No. 2 said he was in his hammock in his living quarters.

At the end of the evidence taken in court, the jury made a request to visit the scene of the robbery and asked that the postal apprentice, the boy scout, the barber, the young married woman and the carpenter should attend. They also wished to see the living quarters of the accused.

On Tuesday, February 15, 1955, the view took place. Before the jury left for the view, they were checked in the presence of the judge to see all were there. The two accused men were there. So were the superintendent of police and counsel for the prosecution. The judge warned the jury not to have any communication or engage in any discussion or argument. The jury then left with the registrar, the marshal, counsel for the prosecution and counsel for No. 2 accused, and the police officers. The two accused were present throughout. They went to the scene of the robbery. The postal apprentice indicated the spot where he said he was robbed, then the bridge where he said he saw the two accused standing. Police sergeant Adams pointed out the Nigg Post Office and two dams which had been mentioned in evidence. The boy scout pointed out the spot where he said he was standing when he saw two men running south. The barber pointed out the spot where he saw accused No. 2. The young married woman pointed out the house in which she lived at the time and the place where she was standing when she saw accused No. 1 going south. The carpenter showed the bridge on which he was standing when he saw accused No. 1.

It appeared that three other witnesses were present at the view. A witness for the defence, Hector Apadoo (who had given evidence in support of No. 2's alibi that he was in his hammock), showed where Nos. 1 and 2 accused were living, and where he himself was living, and the communal latrine. A witness for the prosecution (who was an engine driver who lived on the same estate as the two accused) showed where he was living. A witness for the defence (who had given evidence in support of No. 1's alibi that he was in the boat) indicated the koker south of the estate. Sergeant Adams indicated the house where a witness for the prosecution, named Bacchus, lived.

On the next day after the view the trial was resumed before the judge in court. Sergeant Adams gave evidence of what happened at the view. Sherry Browne, the postal apprentice, was recalled so as to be offered for cross-examination by the accused. They declined the offer. The other witnesses were available also for cross-examination, but counsel for the accused did not take advantage of it. Counsel made their speeches. The judge summed up. The jury found the prisoners guilty by a majority of eleven to one.

1957. April 30; May 1. *Bernard Gillis Q.C.* and *J. Lloyd-Eley* for the appellants. The view was a part of the trial and evidence was given by prosecution witnesses in the absence of the judge. An accused person has an undoubted right to be tried by a judge and jury, so that not only will the judge see that no injustice or impropriety occurs during the proceedings, but he will be in possession of *all* the evidence and be able to charge the jury in the light of it. To deprive an accused person of the right to have the judge in possession of all the testimony and hear every question and answer and see every demonstration is to deprive him of his right to a proper trial and is wholly improper. The point in issue here was not determined in *Reg.* v. *Martin and Webb*,[1] but all the judges thought that it was undesirable that a view with witnesses should take place in the absence of the judge. It is important to note in *Karamat* v. *The Queen*[2] the weight given by the Board to the fact that the judge was throughout in control of the proceedings. In his absence the jury may be receiving evidence unknown to the judge. If a view was for the purpose of seeing, for example, a cross-road, one would not argue that the jury alone was improper; but where, as here, counsel attend and witnesses answer questions, and the prisoner is present, that has become part of the trial and the judge must be present. [Reference was also made to *London General Omnibus Co. Ltd.* v. *Lavell*,[3] *Goold* v. *Evans & Co.*[4] and *Buckingham* v. *Daily News Ltd.*[5]]

This Board in *Karamat's* case[6] has said that a view is part of the trial. That being so, the prisoner must be present so that he can hear the evidence being given during his trial—unless, as in *Karamat's* case,[6] he was given permission to be absent.

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[1] (1872) L.R. 1 C.C.R. 378; 26 L.T. 778.

[2] [1956] A.C. 256; [1956] 1 All E.R. 415.

[3] [1901] 1 Ch. 135; 17 T.L.R. 61.

[4] [1951] 2 T.L.R. 1189.

[5] [1956] 2 Q.B. 534; [1956] 2 All E.R. 904.

[6] [1956] A.C. 256.

When the judge is absent the whole protection that the prisoner undoubtedly has a right to goes. Every part of the trial must be presided over by the judge. It is sufficient for the appellants' purposes here to adopt what was said by Stoby J. in his dissenting judgment: "From *Martin* [7] and *Karamat* [8] the law may be stated "thus: 1. The jury can be permitted to have a view in the "absence of the judge provided no questions are asked and they "communicate with no-one. 2. The jury can ask questions and "witnesses may place themselves in positions they were at the "material time provided the judge is present." Here the prisoners were deprived of their undoubted right to a charge to the jury by a judge who had heard everything. The irregularities in the present case were graver than that in *Seneviratne* v. *The King.*[9] The absence of the judge was such irregularity as to come within the class of case in which this Board has intervened, and the convictions should be quashed: *In re Dillet* [10]; *Ibrahim* v. *The King.*[11]

Lloyd-Eley following. It is obvious from what took place at this view that witnesses were being recalled. That lends force to the argument that the judge himself should be present so that, as in *Karamat's* case,[12] all the questions could be put through him. Further, section 133 of the Criminal Law (Procedure) Ordinance of British Guiana, which deals with the record of the proceedings on trial, shows that it was clearly intended that every part of the proceedings in which the evidence was given should be the subject of a memorandum in the Crown Book and in the judge's note—so he must be present when such evidence was being given.

J. G. Le Quesne for the Crown. While not making any concession as to what the law in England may be, the first submission is that this case must be decided primarily under the Criminal Law (Procedure) Ordinance of British Guiana, and therefore the matter of first importance is section 45, which provides, inter alia, that "the court or judge may direct that view to be had in the "manner and upon the terms and conditions to the court or "the judge seeming proper." Section 133 takes the matter no further. If the proper interpretation of section 45, read by itself, is that it is open to a judge, if he thinks it proper, to direct a view to be held without his own presence, then that interpretation

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[7] L.R. 1 C.C.R. 378.
[8] [1956] A.C. 256.
[9] [1936] 3 All E.R. 36, 51.
[10] (1887) 12 App.Cas. 459.
[11] [1914] A.C. 599, 615; 30 T.L.R. 383.
[12] [1956] A.C. 256.

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should not be abandoned because of section 90, which provides that "the trial shall be had by and before a judge of the court "and a jury." Section 45 is laying down the circumstances in which a view may take place, including demonstrations by witnesses. That being so, the language of the section is perfectly general and is designed to give to the judge the widest discretion in any way which it seems to him to be proper. The view may take place in the absence of the judge. Section 45 treats all views alike; there is nothing to be found in it to justify any discrimination between one sort of view and another.

[Earl Jowitt. Their Lordships are of opinion that section 45 applies to views attended by witnesses for the purpose of demonstration.]

In those circumstances there are only two possibilities: either the judge is obliged to attend every view which is held in any trial by jury on indictment, or he is not obliged to attend any; and since he need not attend one without witnesses, neither need he attend one with witnesses. Under this Ordinance it is not permissible to go back to the English common law unless a gap can be found in the Ordinance.

It is permissible for witnesses to indicate to the jury material places, and that would involve no breach of section 45; although they are in a sense evidence, they are repetition or explanation of evidence already given. *Reg.* v. *Whalley*[13] shows the development of the view; it was then a novelty and one would have expected every precaution to be taken, and yet one found that, although someone was going to point out places to the jury, the judge himself did not attend. Section 45 is dealing indiscriminately with such views as those in *Whalley*[13] and *Karamat.*[14] The section goes back substantially in this form to the Indictable Offences Procedure Ordinance, 1893, s. 44. If it had been the intention in 1893 that the judge must always attend, one would have found in section 44 quite different language. Section 45 is not apt to impose any obligation on the judge to attend a view—that is the position under the law of British Guiana. Under the law of England, strictly speaking, there is no authority on this question either way, but see the argument in *Reg.* v. *Martin and Webb.*[15]

Assuming, however, that what took place here was irregular, the question arises as to the proper course for the Board to take in the circumstances of this appeal. It was conceded for the

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[13] (1847) 2 Car. & K. 376.

[14] [1956] A.C. 256.

[15] 26 L.T. 778, 779.

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appellants that there was ample evidence to support the charge in the indictment. It was also agreed that it was very difficult to see what help the jury could have got from the view in considering the evidence in this case. And it was not suggested that any witness introduced at the view any new evidence beyond that which he had previously given. The result is that the case now stands exactly as it stood before the Court of Criminal Appeal; there is no allegation of any impropriety at the view except the absence of the judge. There was therefore no difficulty in the judge putting to the jury the whole of the evidence on this charge. *Reg.* v. *Murphy*[16] deals with verdicts obtained as a result of evidence given out of court. To invalidate the verdict it has to be shown that it was actually founded on evidence given out of court; it is impossible to say here that the verdict was founded on such evidence, so as to justify interference by the Board. *Seneviratne* v. *The King*[17] is distinguishable; see also *Rex* v. *Twiss*.[18] All that has happened here is that evidence perfectly and properly given in the presence of the judge has been repeated in his absence. Even if his absence was an irregularity and not authorized by section 45 of the Ordinance, nevertheless it is not shown that its effect has been to cause any serious miscarriage of justice.

Gillis Q.C. in reply. There can be no greater irregularity in a criminal trial than that any part of it should proceed in the absence of the judge. Sections 45 and 90 of the Ordinance require that the trial shall be at all stages before the judge and jury.

May 1. EARL JOWITT announced that their Lordships would humbly advise Her Majesty that the appeal should be allowed and the convictions quashed, and that they would give their reasons later.

June 18. The reasons of their Lordships for allowing the appeal were given by LORD DENNING. This was an appeal by special leave from a judgment of the Court of Criminal Appeal in British Guiana dismissing the appeal of the two appellants against their conviction for robbery with aggravation after a trial before Miller J. and a jury. At the close of the argument their Lordships announced that they would humbly advise Her Majesty to allow the appeal and quash the convictions; and they now give their reasons for the advice which they tendered.

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[16] (1869) L.R. 2 P.C. 535, 549.

[17] [1936] 3 All E.R. 36.

[18] [1918] 2 K.B. 853, 858; 35 T.L.R. 3.

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The point on which special leave to appeal was granted was the fact that the jury had a view with witnesses *in the absence of the judge*. The question is whether that vitiates the trial. The judges in the Court of Criminal Appeal were divided in opinion. Holder C.J. and Phillips J. thought that it would not warrant their holding that the trial was irregular. Stoby J. held that the judge's absence was fatal.

[His Lordship stated the facts set out above and continued:] It is important to notice that there is no suggestion of impropriety on the part of the jury or witnesses or anybody else at the view or any irregularity apart from the absence of the judge. No complaint was made at the trial about the absence of the judge, for the simple reason that in British Guiana for many years it has not been regarded as necessary for the judge to attend a view. It appears that in British Guiana many judges in the past have not accompanied the jury, and in a case decided in 1954 (*Hassam Mahamed* v. *The Queen* [1]) the Court of Criminal Appeal in British Guiana had held that the absence of a judge on a visit to the place was not an irregularity.

The question for our consideration is whether the absence of the judge at the view is a fatal defect in the trial.

In England it is a rare thing for a jury in a criminal trial to view the place where the crime is said to have taken place. At one time it was never done at the assizes except with the consent of the prosecution. But in a case in 1847 on a trial for rape, the defence wished the jury to have a view, in order to support the contention that it was so public a place that it was unlikely for the offence to have taken place there. The prosecution did not consent, but nevertheless the judge allowed a view. It was regarded as a thing of such moment that the jury were accompanied by the under sheriff, the chief constable, 20 policemen and 12 javelin men; but the judge apparently did not go with them. Nor did the prisoner. It is to be noticed that there were no witnesses. (See *Reg.* v. *Whalley*.[2]) Such a view is on a par with the common case where a thing is too large or cumbrous to bring into court but is left in the yard outside. It is everyday practice for the jury in such a case to be taken to see the thing. The judge sometimes goes with them. Sometimes he goes by himself. But there are no witnesses and no demonstration. Their Lordships see nothing wrong in a simple view of that kind, even though a judge is not present. In a case of motor manslaughter, any member of the jury could go in the evening and look at the place by himself if he wished, without being guilty of any irregularity.

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[1] C.C.A. No. 17 of 1954.

[2] (1847) 2 Car. & K. 376.

It is very different when a witness demonstrates to the jury at the scene of a crime. By giving a demonstration he gives evidence just as much as when in the witness-box he describes the place in words or refers to it on a plan. Such a demonstration on the spot is more effective than words can ever be, because it is more readily understood. It is more vivid, as the witness points to the very place where he stood. It is more dramatic, as he re-enacts the scene. He will not, as a rule, go stolidly to the spot without saying a word. To make it intelligible he will say at least "I stood here" or "I did this," and, unless held in check, he will start to give his evidence all over again as he remembers with advantages what things he did that day. But however much or however little the witness repeats his evidence or improves upon it, the fact remains that every demonstration by a witness is itself evidence in the case. A simple pointing out of a spot is a demonstration and part of the evidence. Whilst giving it the witness would still be bound by the oath which he had already taken to tell the truth. If he wilfully made a demonstration, material to the proceedings, which he knew to be false, he would be guilty of perjury.

In England the Court of Appeal has clearly held in civil cases that a view, coupled with a demonstration, is part of the evidence. So much so that if it takes place in the absence of one party without his consent, the trial is bad—see *Goold* v. *Evans & Co.*[3] Or again, it may of itself outweigh all the other evidence in the case, so that the judge can found his decision upon it without more—see *Buckingham* v. *Daily News Ltd.*[4] Their Lordships have held likewise, in a criminal case in an appeal from British Guiana, that a view, at which witnesses give demonstrations, is part of the evidence—see *Karamat* v. *The Queen.*[5]

Now if a view of this kind is part of the evidence—as their Lordships are clear that it is—it would seem to follow that it must be held in the presence of the judge. It is the very essence of a criminal trial that it must be decided on the evidence before the court and not on any outside information; and that the judge and jury must be present throughout the giving of the evidence and every part of it, so as to be able to appreciate it and assess its worth: and throughout the speeches of counsel too. The summing-up of the evidence by an impartial judge with a trained mind is an essential part of every criminal trial: but it can only properly be done by a judge who has heard all the evidence and seen all the demonstrations by witnesses. The judge, for instance, may notice something at a demonstration which may be of vital import but passes unnoticed by everyone else until he draws attention to it. His presence ensures not only that the proceedings are properly conducted but also that no relevant point on either side is overlooked.

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[3] [1951] 2 T.L.R. 1189.

[4] [1956] 2 Q.B. 534; [1956] 2 All E.R. 904.

[5] [1956] A.C. 256; [1956] 1 All E.R. 415.

This much has been said because there was a case in England many years ago which at first sight suggests the contrary. It is *Reg.* v. *Martin and Webb*,[6] where two men were charged with indecency in a urinal. Two policemen gave evidence of what they had seen through the bars in a wall. After the judge had summed up, the jury asked to view the place so as to see whether the policemen could have seen what they asserted. No objection was made on behalf of the prisoners. The jury had a view. The judge did not attend. Nor did the prisoners. On the return of the jury to the court, without any further direction from the judge, they found the prisoners guilty. Afterwards the court was informed that the two police witnesses had gone to the view and pointed out where they had stood at the time of the alleged offence and the position in which the prisoners were standing: and that the jury had then placed themselves in the same spot and looked through the bars. A case was thereupon stated for the opinion of the court on the ground that there had been a mistrial in that (inter alia) the jury had at the view put questions to the witnesses and thus received evidence in the absence of the judge and the prisoners. The Court for Crown Cases Reserved refused to determine this point because there had been no examination in the court below into the facts of what took place at the view. The alleged reception of evidence out of court might be a mere rumour without any foundation. The conviction was therefore affirmed. Their Lordships cannot regard that case as any warrant for a view to take place with witnesses in the absence of the judge. A reference to the report in 26 L.T. 778 shows that, during the argument, all the judges thought it was undesirable and some thought it was wrong: but they did not determine the point because the facts were not properly before them. Now that the point has arisen for decision, their Lordships have no hesitation in saying that it is not only undesirable but that it is wrong for a view to be had with witnesses in the absence of the judge.

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[6] (1872) L.R. 1 C.C.R. 378; 26 L.T. 778.

Counsel for the Crown sought, however, to justify the practice in British Guiana by reference to the Criminal Law (Procedure) Ordinance of 1953, which re-enacts a provision to the like effect dating back to 1893. It says in section 45: "(1) Where in any "case it is made to appear to the court or a judge that it will be "for the interests of justice that the jury who are to try or are "trying the issue in the cause should have a view of any place, "person, or thing connected with the cause, the court or judge "may direct that view to be had in the manner, and upon the "terms and conditions, to the court or the judge seeming proper. "(2) When a view is directed to be had, the court or judge shall "give any directions seeming requisite for the purpose of preventing undue communication with the jurors: Provided that no "breach of any of those directions shall affect the validity of the "proceedings, unless the court otherwise orders."

Their Lordships think that the view primarily contemplated by that section is a simple view by a jury when no witnesses are present, such as a view of a van in the yard of the court, or of the cross-roads where a motor accident took place. But the section undoubtedly extends to cover a view when witnesses are present and demonstrate where they stood. Their Lordships so held in the recent case of *Karamat* v. *The Queen.*[7] That case formed the basis for much of Mr. Le Quesne's argument. He said that the section applied alike to a view with witnesses as to a view without witnesses: and hence that if a judge need not be present at the one, he need not be present at the other. Their Lordships do not accept this contention. Section 45 enables the court or a judge to determine the terms and conditions on which a view may be held: but this power must be exercised in accordance with the fundamental principles of a fair trial: and one of these principles is that every piece of evidence given by a witness must be given in the presence of the tribunal which tries the case: and the tribunal is not the jury alone, but the judge and jury. Section 90 of the Ordinance says that "the trial shall be had by and before a "judge of the court and a jury." If witnesses give demonstrations or answer questions at a view, that is undoubtedly part of the trial and must be had before the judge and jury.

These observations do not apply to a simple view without witnesses. It often happens that a jury have a simple view of a vehicle in the courtyard by themselves without the judge being present. It is rather like their examination of an exhibit or a plan in the jury room without the judge being present. But the judge usually sees it himself too.

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[7] [1956] A.C. 256.

There remains the question whether the absence of the judge at this view vitiates the trial. Their Lordships are mindful of the principles on which they advise Her Majesty in criminal cases. Slow as their Lordships are to interfere, yet if it is shown that something has taken place which tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future, then their Lordships may well think it necessary to advise Her Majesty to allow an appeal—see *Attorney-General for New South Wales* v. *Bertrand*,[8] *Ibrahim* v. *The King*,[9] *per* Lord Sumner. Their Lordships think it plain that if a judge retired to his private room whilst a witness was giving evidence, saying that the trial was to continue in his absence, it would be a fatal flaw. In such a case, the flaw might not have affected the verdict of the jury. They might have come to the same decision in any case. But no one could be sure that they would. If the judge had been present, he might have asked questions and elicited information on matters which counsel had left obscure; and this additional information might have affected the verdict. So here, if the judge had attended the view and seen the demonstration by the witnesses, he might have noticed things which everyone else had overlooked: and his summing-up might be affected by it. Their Lordships feel that his absence during part of the trial was such a departure from the essential principles of justice, as they understand them, that the trial cannot be allowed to stand. Mr. Le Quesne argued that the conviction should not be set aside unless the absence of the judge was shown to have affected the result of the trial: but their Lordships do not think it should stand in any case. It is too disturbing a precedent to be allowed to pass.

Solicitors: *Druces & Attlee; Charles Russell & Co.*

C. C.

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[8] (1867) L.R. 1 P.C. 520, 530.

[9] [1914] A.C. 599, 615; 30 T.L.R. 383.

[HOUSE OF LORDS.]

H. L. (E.)* VINE . . . . APPELLANT;

AND

1956
Oct. 9, 10, 11, 15;
Dec. 5.

NATIONAL DOCK LABOUR BOARD . . RESPONDENT.

Tribunal—Statutory—Control by courts—Declaration—Labour board—Delegation of disciplinary powers by national board to local board—Unauthorized delegation by local board to committee of local board—Wrongful dismissal—Whether damages sufficient remedy—Whether declaration should be granted—Dock Workers (Regulation of Employment) Order, 1947 (*S.R. & O.* 1947, *No.* 1189), *cll.* 16, 17.
Dock—Dock workers—Labour board. Contract—Repudiation.

The plaintiff, a dock labourer employed in the reserve pool by the defendants, the National Dock Labour Board, under the scheme set up by the Dock Workers (Regulation of Employment) Order, 1947, was allocated work with a stevedoring company but failed to report to them. A complaint lodged with the defendants was heard by a disciplinary committee appointed by the local dock labour board, who upheld the complaint and, purporting to act under cl. 16 (2) (c) of the Order gave the plaintiff notice to terminate his employment with the defendants. His appeal to a tribunal set up under the scheme was dismissed. He started proceedings against the defendants claiming damages for wrongful dismissal and a declaration that his purported dismissal was illegal, ultra vires and void. Ormerod J. awarded him damages and granted a declaration. The Court of Appeal held that damages were a sufficient remedy and that a declaration should not be granted. On appeal to the House of Lords:—

Held, that the plaintiff's dismissal was invalid, since the local dock labour board had no power under the scheme to delegate to a disciplinary committee their disciplinary powers given by clause 16 of the Order, under which a man might be entirely excluded from the employment of a dock worker.

In considering whether a quasi-judicial function can be delegated, the court must take into account the importance of the duty and the persons who would delegate.

Barnard v. *National Dock Labour Board* [1953] 2 Q.B. 18; [1953] 1 All E.R. 1113 applied.

Held, further, ~~that, although it might be that the discretion to give a declaratory judgment should be exercised sparingly,~~ in the present case, having regard to the background of the scheme, it was proper that, in addition to awarding damages, the court should declare the plaintiff's rights.

Decision of the Court of Appeal [1956] 1 Q.B. 658; [1956] 1 All E.R. 1 varied.

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* *Present*: VISCOUNT KILMUIR L.C., LORD MORTON OF HENRYTON, LORD COHEN, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

APPEAL from the Court of Appeal (Singleton and Parker L.JJ., Jenkins L.J. dissenting).

The appeal and cross-appeal in this matter were brought by leave of the House of Lords and were from a judgment of the Court of Appeal given and entered on November 30, 1955, whereby the court dismissed the appeal of the National Dock Labour Board, the defendants in the action, the respondents on the appeal and the appellants on the cross-appeal, but varied the judgment of Ormerod J. in the action tried by him without a jury on July 14, 15 and 28, 1955, at the Hampshire Summer Assizes. Ormerod J. granted a declaration that the purported dismissal by the respondent board of Walter Charles Vine, the plaintiff in the action, the appellant on the appeal and respondent on the cross-appeal, was illegal, ultra vires and invalid, and awarded him £250 damages for wrongful dismissal. The Court of Appeal struck out the declaration.

The facts stated by Viscount Kilmuir L.C. were as follows: The plaintiff was at the material time a dock labourer in the Port of Southampton and had been so employed for many years and was in fact a "registered dock worker available for "work" and "in the reserve pool" within the scheme hereafter described. He was therefore deemed to be in the employment of the National Board. All dock workers are employed and controlled under a scheme embodied in the Schedule to the Dock Workers (Regulation of Employment) Order, 1947, which was made under section 2 of the Dock Workers (Regulation of Employment) Act, 1946.

The relevant portions of the scheme were:—

A. Clause 1, which sets out its objects of ensuring regularity of employment and availability of workers.

B. Clause 3, which establishes the National Board and sets out its functions, including keeping the register or records of dock workers.

C. Clause 3 (3), by which it is the duty of the National Board to delegate as many as possible of their functions to local boards.

D. Clause 5 (2), which deals with the composition of local boards and imports the principle of equal numbers of employers and workers.

E. Clause 6, which (inter alia) includes within the matters for which the local board is responsible to the National Board removal from the register of the name of any dockworker, in accordance with the provisions of the scheme.

F. Clause 8, by which a registered dockworker available for work is required to carry out the directions of the local board.

G. Clause 14, which contains the conditions of payment under the scheme for unemployment or under-employment.

H. Clause 15, which provides for disentitlement to such payment and also for a procedure which has a special relevance; paragraph (4) provides: "The local board shall consider any "written report received under paragraphs (2) or (3) hereof, and "if, after investigating the matter, the board notifies the "registered dock worker that it is satisfied that there has been "such failure or behaviour as aforesaid, the registered dock "worker shall not be entitled to any payment, or to such part "of any payment as the board thinks fit, under clause 14 hereof "in respect of the pay week in which such failure or behaviour "occurred or continues."

I. Clause 16 (2), which provides: "Where a registered dock "worker available for work fails to comply with any of the "provisions of the scheme, then without prejudice to and in "addition to the powers conferred by clause 15 hereof, the local "board may take any of the following steps as regards that dock "worker—it may (*a*) determine that for such period as it thinks "proper he shall not be entitled to any payment under clause 14 "hereof; (*b*) suspend him without pay for a period not exceeding "seven days; (*c*) give him seven days' notice of termination of "employment; (*d*) dismiss him summarily."

J. Clause 17, which provides: "(1) The employment of a "registered dock worker in the reserve pool who is available for "work shall not be terminated except— . . . (*b*) by the giving of "seven days' notice in writing . . . (2) A registered dock "worker in the reserve pool who is available for work shall not "leave his employment with the National Board except by "giving seven days' notice in writing to the local board or so as "to be employed in accordance with the provisions of the "Scheme. (3) [That where the employment of a registered dock "worker by the National Board has been determined as afore-"said] his name shall forthwith be removed from the register "or record."

K. Clause 18, which contains the provisions for certain appeals to an appeal tribunal appointed by the local board.

On November 6, 1947, the South Coast Local Dock Labour Board adopted standing orders under which the local board: (A) should be responsible for administering the scheme and such matters as were assigned to the local board by the scheme or by the defendants (the National Board), subject only to such limitations as might be imposed from time to time by the National Board; (B) might delegate to a committee such of its functions and powers as it might deem appropriate provided such delegated committee conformed to the regulations and restrictions imposed by the National Board, or the local board; (C) determined its own quorum, to consist of seven persons.

The local board set up disciplinary committees consisting of two members (one from the employers and one from the dock workers); such duties were to be undertaken by the members of the local board in turn.

On February 3, 1948, the National Board, in accordance with clause 3 (3) of the scheme, approved the delegation of functions to committees of local boards, including the delegation of powers to disciplinary committees in the manner previously resolved by the local board.

On October 29, 1952, the plaintiff was detailed for work with a company of stevedores, J. Rose & Co., Ltd. (who were in fact registered employers within the scheme) and was required to start shift work at 8 p.m. on that day. The plaintiff did not attend for the work and was reported to the local manager of the National Board by the stevedores by letter dated October 30, 1952. On the same day one E. W. Chapman, the local manager on behalf of the National Board, reported this complaint to the plaintiff and invited his explanation. By letter dated November 1, 1952, the plaintiff gave the following explanation in writing: " Had requested to port officer to be given work so that " I could finish at 5 o'clock and was refused."

By letter dated November 6, 1952, Chapman, on behalf of the National Board, gave notice to the plaintiff that a disciplinary committee would consider his case on November 13 and requested him to be in attendance. On November 13 a disciplinary committee (consisting of two members of the local board, one representing the employers and one representing the dock workers) was convened in accordance with the rules and standing orders of the local board, already referred to, and heard the complaint made against the plaintiff and his explanation.

The minutes of the meeting of the disciplinary committee show that, after a careful consideration of all the facts and circumstances of the case, including the plaintiff's previous record, the committee agreed that he should be given seven days' notice to terminate his employment with the National Board on grounds which they stated as follows: "Failure to report "for work at 8 p.m. on October 29, 1952, after being allocated "at the 12.45 p.m. call that day, in addition to failure from "time to time to comply with terms of local agreements."

In accordance with the decision of the committee, notice in writing was on the next day given to the plaintiff to terminate his employment with the National Board on Saturday, November 22. By letter dated November 16, 1952, the plaintiff gave notice of appeal against this decision and was given a statement of the case against him.

On November 29, 1952, the plaintiff's appeal was heard and disallowed without variation; he was consequently informed that the notice terminating his services remained operative and he ceased to work for the National Board from November 22, 1952.

Dingle Foot Q.C. and *Thomas Kellock* for the appellant. The issues are (1) whether the appellant was lawfully dismissed by the respondents; (2) whether the judge rightly exercised his discretion in granting a declaration; (3) whether the appellant elected at any time to treat his contract of employment as repudiated; (4) whether the award of £250 was adequate; (5) whether the appellant's claim was barred by the Limitation Act, 1939. The House is mainly concerned with the first two issues and *Barnard* v. *National Dock Labour Board*[1] must be considered.

Under the Order of 1947 it does not matter whether the precise relationship is that of master and servant. What does matter is whether a man is on the register. In return for the obligations imposed on the dock worker by the scheme he is given a degree of security from unemployment so that, apart from redundancy, he can only be dismissed for some default on his part. The local board, who consider such matters, have no power to delegate their functions to a disciplinary committee. Magistrates cannot delegate their powers to some of their number, nor can a jury. The Court of Appeal were right, both in this case and in *Barnard's* case,[1] in holding that the functions of the board are judicial or quasi-judicial and cannot be delegated. The appellant was entitled to have his case considered by the tribunal prescribed. A man may be dismissed (1) for disciplinary reasons under clause 16, and (2) for the purpose of reducing the register in the event of redundancy. The latter case would be a ministerial act which could be carried out by the servants of the National Dock Labour

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[1] [1953] 2 Q.B. 18; [1953] 1 All E.R. 1.

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Board: clause 3. But in the former case there is no power to delegate. As to "judicial" and "quasi-judicial," see *Cooper* v. *Wilson*.[2] Here one is dealing, not merely with a statutory scheme or with a contract of master and servant, but with something which determines a man's status. As to the distinction between administrative and judicial decisions, see the Report of the Committee on Ministers' Powers (1932, Cmd. 4060), p. 81. Here the local board was charged to perform a quasi-judicial act and could not delegate it. If it could do so, it would be in its power to delegate its functions to a body on which employers and employed were not equally represented and which was not a microcosm of itself. Whether action is taken under clause 16 or clause 17 in a disciplinary matter the proceeding is judicial or quasi-judicial. Clause 17, which is a limitation on clause 16, by itself confers no power to terminate. Even if, contrary to the appellant's contention, the clauses are to be read disjunctively and separately, on the true construction of clause 17 it still imposes a judicial or quasi-judicial function, because, on any view, there is a right of appeal: see clause 18. Under clause 16 there is clearly a judicial or quasi-judicial function and it would be strange if the position were not the same under clause 17. On the face of it, one would suppose that the words used mean the same thing in each clause.

As to the appropriate remedy, a declaration is the only way in which the legal rights of the parties can be established. The appellant's argument on this point is perfectly set out by Jenkins L.J. in the Court of Appeal.[3] A variety of cases where the court has granted relief by declaration or injunction were referred to by Denning L.J. in *Barnard's* case.[4] The question of election is really the same point. If the appellant were left to his remedy in damages, £250 would be inadequate. The limitation point may be left till after the cross-appeal has been argued.

Harold Brown Q.C. and *Guy Willett* for the respondents. The respondents' submissions are: (1) The dismissal of the appellant was an administrative act rightly carried out on behalf of the respondent board by its delegate, the disciplinary committee. (2) If the act of dismissal could be carried out only by the local board, it was in fact so carried out. Alternatively, it was the respondents' own administrative act which could be and was properly delegated by the local board. (3) If the act of dismissal was wrongful, the appellant's only remedy is in damages; it was a repudiation of the employment and the appellant elected to accept the repudiation, so that an award of damages was the only relief open to him. In any event no declaration should be granted. (4) The award of damages was excessive, whether calculated to the date of trial or for all time.

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[2] [1937] 2 K.B. 309, 340–341; 53 T.L.R. 623; [1937] 2 All E.R. 726.

[3] [1956] 1 Q.B. 658, 675–676; [1956] 1 All E.R. 1.

[4] [1953] 2 Q.B. 18, 41–42.

The real objects of the scheme are to ensure that there are enough men to do the work and that the workers have adequate work and a guaranteed wage, and to arrange for men to attend regularly at the docks. The guaranteed wage is to be paid only to regular attenders; hence the necessity of the register. The scheme presupposes the old common law relationship of master and servant with the private employer, save that a man in the reserve pool is in the employment of the board.

The scheme must be construed in the light of the history of dock work and against the background of the employers' needs of labour and inducements to dock workers. The outstanding features of this background were the employers' uncertainty of getting labour and the casual nature of work for dock workers, particularly as men from other trades would attend for work at the docks when their own trade was slack. The objects of the scheme are set out in section 1 of the Dock Workers (Regulation of Employment) Act, 1946, and clause 1 (2) of the scheme. These do not show any intention to give security of employment in the sense that the Rent Restriction Acts and the Landlord and Tenant Act, 1954, give security of tenure: see the long title of the Act of 1946. The respondent board have no monopoly. It is not a nationalized industry or a trading concern. It is the co-ordinating link between employers and men. The employers pay the wages due from them to the respondent board, who in turn pay the dock workers (clauses 6 (*f*) and 9 (6)), and they also pay contributions towards the cost of operating the scheme (clauses 3 (1) (*h*) and 21). The board run the industry, in the sense of administering the scheme in the interests of the community and not for the benefit of employers or dock workers. There is no magic in registers kept under the scheme. They are merely necessary machinery to keep a check on men who attend regularly, to see that they alone have a right to a guaranteed wage and so to keep out casuals. In every reference in the scheme to the register of dock workers the description is register or record: see clauses 2, 3 (1) (*c*) (*e*), 6 (1) (*b*), 11 (1) and many others except clauses 5 (7) (*a*) and 18 (1), (2).

The scheme is a statutory contract of service. The men are allocated employment, whether for shift, day or week, and are then in the employment of the registered employer. See clause 2 (1) for the definition of " dock employer " and clauses 6 (1) (*f*), 9 (5), 10 (1) and 12. When not allocated, dock workers are in the employment of the respondent board and in the reserve pool. When during a week a dock worker is partly employed and partly in the reserve pool, his wages are made up, if necessary, to the guaranteed minimum (clause 14 (1)). This is not a case of an overall employer (the respondent board) hiring out men to employers. The position of master and servant alternates between the respondent board and the dock worker and the registered employer and the dock worker.

As to clause 16 (2), the first line is wide enough to cover both types of employment; (*a*) can only refer to the reserve pool; (*b*) can refer to the reserve pool and private employment; (*c*) and (*d*) must refer to allocated employment. There is no appeal in the case of (*c*) and (*d*). There is no provision for striking off the register. Clause 17 deals with dock workers in the reserve pool. The proper construction of clause 17 must exclude the reserve pool from (*c*) and (*d*). Although in an ordinary contract of service the master alone can dismiss, here the local board is given special power. Clause 16 (2), though expressed to be in addition to, and without prejudice to, clause 15, generally speaking, gathers up the ends of clause 15. Otherwise (*c*) and (*d*) are quite unnecessary, since there is similar power under clause 15 (3), and clause 17 can be relied on alone for the reserve pool. Further, clause 15 (3) provides for report to the local board and (*c*) and (*d*) enable the local board to terminate, or dismiss from, allocated employment in cases where the private employer refuses, or does not wish, or neglects, to do so. The construction contended for by the appellant means that clause 16 (2) (*c*) and (*d*) can only refer to the reserve pool. If that were so they would be unnecessary, as clause 17 provides for it. In the statement of claim the appellant relies on the act of dismissal being under clause 16, and if the act was not under clause 16 the basis of the complaint goes.

Clause 17 is to be read alone and not with clause 16. The marginal note " termination of employment " is different from the marginal note of clause 16. If the clauses are read together, the respondent board can never dismiss for " serious misconduct " unless it is a breach of the scheme: see the opening words of clause 16 (2). Pilfering, incitement to unofficial strikes, the commission of crime generally, are not breaches of the scheme, and so there would be no remedy against the dock workers. Further, in the case of old age or infirmity, if a dock worker reported at call stands he would have to be paid a guaranteed wage for life as there would be no way of discharging him save by agreement, which in fact is the case in this port. If it had been intended that clause 17 should be read with clause 16, then clause 16 (2) would have had suitable words added to cover men in the reserve pool, e.g., at the end of the clause: "save "that in the case of dock workers in the reserve pool such dis-"missal shall be only in the case of serious misconduct." It is noteworthy that in clause 17 (1) (*b*) the notice is required to be in writing, whereas this is not so under clause 16 (2) (*c*). Again, suitable words could have been added to cover the case of men in the reserve pool, if it had been required to be read with it. Most of clause 17 has nothing to do with clause 16 and it is unlikely that the draftsmen would have added matters of a purely administrative character. Clause 16 (2) specifically says "without "prejudice to and in addition to the powers conferred by clause "15." If clause 17 was to be read with clause 16, one would expect similar words of reference or, for example, after the word "terminated" in clause 17 (1) the words "under clause 16 (2) "(*c*) and (*d*) hereof."

Clause 18 did not confer any right of appeal on a workman aggrieved by the termination of his contract under clause 16 (2) (*c*).

The dismissal was an act of the respondents under clause 17 (1) (*b*) which was quite independent of the power conferred on the local board by clause 16 (2).

It would be wrong to deprive the respondents of their common law rights. They are responsible for a scheme extending to all parts of the country. It would be intolerable if they could not act as an ordinary reasonable employer can act. There must of necessity be delegation, since the board cannot meet to decide all questions of dismissal. There is a wide range of disciplinary activities involving hundreds of cases a year. Clause 17 was never in question in *Barnard's* case.[4] But, in any event, that case was wrongly decided.

As a matter of practice it was the rule that a man should have written notice of any complaint and be given an opportunity to be present when the committee was considering the matter, but there was no compulsion either on the respondents or on the local

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[4] [1953] 2 Q.B. 18.

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board to hold any inquiry. Either a procedure is judicial or it is not. "Quasi-judicial" just means that one must act reasonably in all the circumstances. Here the action taken was purely administrative and there was no duty fixed on the local board or on whoever had the power of dismissal of holding any inquiry. The position was not at all like that in *General Medical Council* v. *Spackman.*[5] As to judicial and quasi-judicial proceedings, see *Local Government Board* v. *Arlidge*[6] and *B. Johnson & Co. (Builders) Ltd.* v. *Minister of Health.*[7] See also *Nakkuda Ali* v. *Jayaratne.*[8] No injustice was done here: see *Osgood* v. *Nelson.*[9] This was not a tyrannical act against a man with a good record. The appellant had not a good record.

Declarations should only be granted cautiously and sparingly: *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade Ltd.*[10] The view against the respondents' contentions is put with most force in *Hanson* v. *Radcliffe Urban District Council.*[11]

[VISCOUNT KILMUIR L.C. intimated that their Lordships required to hear argument in reply only on the question of the right to delegate to a disciplinary committee.]

Dingle Foot Q.C. in reply. The powers are judicial or quasi-judicial and there can be no question of delegation: see *Royal Aquarium and Summer and Winter Garden Society Ltd.* v. *Parkinson,*[12] where no distinction arose between deciding cases and acting administratively. In the departmental authorities the acts of officials are regarded as being those of the Minister and there is no question of delegation. A judicial act implies that the matter must be decided by a body sitting in something like a court of justice. It is of the essence of the conception that a tribunal sitting judicially must decide the matter itself. Here the functions are imposed directly on the local board and cannot be discharged by anyone else. The matter must be decided by the local board's own judicial mind and not by that of anyone else. The scheme imposes obligations as well as privileges on dock workers. A man cannot be dismissed save for a breach of the scheme, and that involves a judicial inquiry. *Johnson's* case,[13] relied on by the respondents, was an example of a purely administrative decision: see *per* Cohen L.J. In *Nakkuda Ali's* case [14] the matter was held to be administrative.

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[5] [1943] A.C. 627; 59 T.L.R. 412; [1943] 2 All E.R. 337.

[6] [1915] A.C. 120; 30 T.L.R. 672.

[7] (1947) 177 L.T. 455, 458; [1947] 2 All E.R. 395.

[8] [1951] A.C. 66, 77–78; 66 T.L.R. (Pt. 2) 214.

[9] (1872) L.R. 5 H.L. 634, 646.

[10] [1921] 2 A.C. 438, 445, 448; 37 T.L.R. 919.

[11] [1922] 2 Ch. 490, 508; 38 T.L.R. 667.

[12] [1892] 1 Q.B. 431, 452; 8 T.L.R. 352.

Here under clause 16 the question whether or not a man has committed a breach of the scheme is purely a question of right and wrong equivalent to a lis between the board and the man himself. The board must distinguish between its judicial and its prosecuting capacity. Here there are all the characteristics of a judicial proceeding.

Their Lordships took time for consideration.

December 5. VISCOUNT KILMUIR L.C. My Lords, the appeal and cross-appeal in this matter are brought by leave of your Lordships' House from a judgment of the Court of Appeal dismissing an appeal from, but varying the judgment of, Ormerod J. The judge had granted a declaration that the purported dismissal by the National Dock Labour Board (whom I shall call "the "National Board") of Mr. Vine (whom I shall call "the "plaintiff") was illegal, ultra vires and invalid and had awarded him £250 damages. The Court of Appeal, by a majority, struck out the declaration.

As a result of the appeal and cross-appeal your Lordships have now to decide whether that purported dismissal was invalid, whether the majority of the Court of Appeal were right in striking out the declaration and whether the award of £250 damages should stand.

[His Lordship stated the facts and continued:] On these facts and provisions of the scheme Mr. Harold Brown submitted that the National Board had an independent power, under clause 17 of the scheme, which they could and did exercise through the disciplinary committee, who acted on their behalf. I do not think that it is necessary to decide whether they could exercise a power independent of that of the local board under clause 16, because I am quite certain that they did no such thing. The happenings that I have set out above occurred as the result of the procedure laid down by clauses 15 (4) and 16 (2) being put into operation by the disciplinary committee on behalf of the local board. Mr. Brown's first submission is as unreal as it is ingenious and therefore fails.

I now turn to the contention that the local board could delegate its functions to the disciplinary committee. I have had the advantage of seeing in print the opinion which my noble and learned friend, Lord Somervell of Harrow, is about to express and, on this part of the case, I find myself in complete agreement with it. It was urged that the very idea was negatived by the fact that this was a quasi-judicial act. I am not prepared to lay down that no quasi-judicial function can be delegated, because the presence of the qualifying word " quasi " means that the functions so described can vary from those which are almost entirely judicial to those in which the judicial constituent is small indeed (see *Cooper* v. *Wilson*,[1] *per* Scott L.J.). As so much has been said on this point I think it is right to say that there is a judicial element here in the sense discussed by Donovan J. in *Rex* v. *Metropolitan Police Commissioner, Ex parte Parker*.[2]

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[13] 177 L.T. 455, 463.

[14] [1951] A.C. 66.

Nevertheless, that is not the end of the matter. It is necessary to consider the importance of the duty which is delegated and the people who delegate. In this case the duty is to consider whether a man will be outlawed from the occupation of a lifetime. The scheme will not work unless discipline is maintained by the wise use of that power. I do not make any reflection on the ability or sense of justice of the pairs of gentlemen who from time to time form the committee. I notice that the pair would always consist of one representative of the employers and one of the workers, but my view is that this duty in this scheme is too important to delegate unless there is an express power.

I reach the same conclusion when I consider this from the aspect of who may delegate. The duty is placed on the local board. It is obviously possible that cases may occur in which not only the man but his trade union and employers may want a decision of the whole board. Again, I think that they are entitled to have it unless the scheme says otherwise. Further, as was mentioned in the argument, if one allows the principle of delegation, it would then be possible, although neither probable nor practicable, for the board to delegate its functions to a committee which was not a microcosm of itself but a body on which employers and employed were no longer equally represented.

For all these reasons, I do not think that delegation was possible. The decision of the disciplinary committee was therefore a nullity which, it is conceded, cannot be cured by appeal.

I now turn to the striking out of the declaration made by

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[1] [1937] 2 K.B. 309, 341; 53 T.L.R. 623; [1937] 2 All E.R. 726.

[2] [1953] 1 W.L.R. 1150, 1157; [1953] 2 All E.R. 717.

Ormerod J. The granting of a declaration is a matter of discretion, and, in view of the opinions expressed by the majority of the Court of Appeal, I have considered what was said on this subject in your Lordships' House in *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade Ltd.*[3] In that case Lord Finlay said,[4] in the course of his dissenting opinion: "The question in what cases the jurisdiction to give a "declaratory judgment should be exercised has been considered "in a number of cases which were called to our attention by "Mr. Hogg." Lord Finlay then cited the expressions used in those earlier cases: "sparingly," "with great care and "jealousy," "with extreme caution." I agree that the discretion should not be exercised save for good reason. On the other hand, I find helpful the Scottish tests set out in that case by Lord Dunedin, who said[5]: "The question must be a real "and not a theoretical question; the person raising it must have "a real interest to raise it; he must be able to secure a proper "contradictor, that is to say, someone presently existing who has "a true interest to oppose the declaration sought." It seems to me that, however "cautiously" or "sparingly" the discretion is to be exercised, this is a case in which the judge was right to grant a declaration.

I should, on this point, be content to leave the matter as stated by Jenkins L.J., with whose judgment I am in entire agreement, but as I am differing from the majority of the Court of Appeal I think it right to summarize my reasons. First, it follows from the fact that the plaintiff's dismissal was invalid that his name was never validly removed from the register and he continued in the employ of the National Board. This is an entirely different situation from the ordinary master and servant case; there, if the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract. Here, the removal of the plaintiff's name from the register being, in law, a nullity, he continued to have the right to be treated as a registered dock worker with all the benefits which, by statute, that status conferred on him. It is therefore right that, with the background of this scheme, the court should declare his rights.

Secondly, it was said that the grant of a declaration would lead to further litigation; I cannot believe that the National Board would do other than comply with the declaration, and, in that case, I do not see why there should be further litigation. Thirdly, for the reasons given by Jenkins L.J., I find it difficult to see that damages would be an adequate remedy. Nor can I see that the conduct of the plaintiff as a result of the board's action, or the form of his pleadings, should be a bar to his obtaining the remedy he asks for.

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[3] [1921] 2 A.C. 438; 37 T.L.R. 919.

[4] [1921] 2 A.C. 438, 445.

[5] Ibid. 448.

Although doubts have been expressed on the quantum of the damages, I cannot see such an error of principle as calls for the interference of your Lordships' House.

I would, therefore, allow the plaintiff's appeal and dismiss the cross-appeal.

LORD MORTON OF HENRYTON. My Lords, as there is a cross-appeal in this case, I find it convenient to refer to Mr. Vine as "the plaintiff" and to the respondents as "the National Board."

Three questions arise for determination: (1) Was the purported dismissal of the plaintiff, as from November 22, 1952, effective or invalid? (2) If it was invalid, was the Court of Appeal right in reversing, by a majority, the decision of Ormerod J. to make a declaration to that effect? (3) Should the learned judge's award of £250 damages to the plaintiff be altered?

As to the first question, Mr. Brown, for the National Board, submitted that the dismissal was an act of that board under clause 17 (1) (*b*) of the Dock Workers (Regulation of Employment) Order, 1947. That clause and the other relevant clauses have already been read, and I need not repeat them. Mr. Brown submits that this sub-clause conferred a power upon the National Board which was quite independent of the power conferred on the local board by clause 16 (2) of the scheme; and that the giving of notice to the plaintiff was an administrative act rightly carried out on behalf of the National Board by its delegate the disciplinary committee. Alternatively, he submits that if the act of dismissal could be carried out only by the local board, it was in fact carried out by the local board.

My Lords, I am prepared to assume, without expressing any opinion on the point, that clause 17 (1) (*b*) of the scheme confers an independent power upon the National Board, but in my view it is plain from the course of events, as set out in the judgment of Ormerod J., that the whole matter was dealt with by the disciplinary committee, purporting to act as the delegate of the local board and following the procedure laid down in clauses 15 (4) and 16 (2) of the scheme. Neither the local board nor the National Board at any time considered the written report given by

Messrs. J. Rose & Co. Ltd. or investigated the matter; nor did either of them at any time arrive at any decision on the penalty which should be imposed on the plaintiff. Thus the question arises whether the giving of notice to the plaintiff was an administrative act which could be delegated and was properly delegated by the local board.

I do not find it surprising, my Lords, that the local board thought they could delegate their duties under clauses 15 (4) and 16 (2) of the scheme to a disciplinary committee, especially as they were careful to provide that the committee was to consist of " one member representing the dock workers and one " member representing the employers." The question whether these duties could or could not be delegated has been argued at length in this House, and I have found it difficult to arrive at a conclusion upon it. I add that if delegation was permissible at all, the selected delegate, the disciplinary committee, appears to me to have acted with perfect propriety throughout; but if delegation was not permissible, the dismissal of the plaintiff was a nullity and this House must so hold, however unfortunate may be the result to the National Board in the discharge of its heavy and important duties. The learned judge and the Court of Appeal, following the case of *Barnard* v. *National Dock Labour Board*,[6] unanimously took the view that the duties and powers assigned to the local board by clauses 15 (4) and 16 (2) of the scheme could not be delegated, and I have arrived at the conclusion that they were right.

Action under these clauses arises when a written report is made to the local board that a worker has been guilty of the conduct described in sub-clause (2) or sub-clause (3) of clause 15 of the scheme. The sequence of events is, then, as follows, under clause 15 (4):—First, " the local board shall consider " the written report. Then it must " investigate the matter " and form an opinion as to whether the worker has committed the offence alleged in the employer's report. If the local board is " satisfied " that he has, it must then consider (*a*) whether the worker has any valid excuse for his conduct and (*b*) which, if any, of the penalties mentioned in clause 16 (2) of the scheme should be imposed upon him.

These duties, viewed as a whole, are, in my opinion, duties of a judicial character, and the decision of the local board may be of vital importance to the worker, as it may involve dismissal.

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[6] [1953] 2 Q.B. 18; [1953] 1 All E.R. 1113.

If, in an ordinary contract of service, a man is dismissed by his employer, it is open to him to seek and obtain employment in the same or another line of work with another employer; but the result of dismissal from employment under this scheme is wholly to remove the man from employment as a dock worker. Further, it must be borne in mind that if the local board could delegate these duties at all, they could be delegated to any person or body of persons. In my opinion, the true meaning and intent of the scheme is that these duties shall only be carried out by the carefully balanced body to which they are directly entrusted under the scheme, the local board. I do not doubt that many of the numerous duties imposed upon the local board by the scheme can be delegated, and an express power of delegating certain duties to a registration committee is given by clause 5 (7) (*a*); but the duties imposed by clauses 15 (4) and 16 (2) are on a special footing, for the reasons I have given. I add that much of the argument centred round clauses 17 and 18 of the scheme, and I think that it is by no means clear what is the precise relationship between clause 17 and clause 16 and what exactly are the rights of appeal conferred by clause 18. I have not found it necessary to form an opinion on these matters, but I think that these clauses might well be reconsidered and clarified by amendment.

Next, Mr. Brown submitted that if the act of dismissal was wrongful, the plaintiff elected to accept the act of the board as a repudiation of the contract, so that an award of damages was the only relief open to him. On this point I need only say that, in agreement with Ormerod J. and the Court of Appeal, I cannot find any such election by the plaintiff, either in his conduct after November 22, 1952, when the notice of dismissal took effect, or in the statement of claim delivered on January 12, 1954, or in any subsequent pleading.

My Lords, I now come to the question whether the Court of Appeal was right in reversing, by a majority, the decision of the learned judge to make a declaration that the purported dismissal was invalid. Mr. Brown submitted that the only remedy open to the plainitiff was an award of damages and, alternatively, that if the court had power to grant a declaration, no declaration should have been made in the circumstances of the present case.

My Lords, I hope I shall not be thought wanting in respect to the judgments of the majority of the Court of Appeal, with which I have so far agreed, if I say that on this point I find myself entirely in agreement with the judgment of Jenkins L.J. I am content to adopt, without qualification, everything that he said on the point, and I would only add this. If your Lordships agree with the views which I have stated, the result is that the purported dismissal of the plaintiff is a nullity. To give him an award of money, as the learned judge did, for the damage he suffered up to the date of the judgment is only to give him part of the relief which he ought to have. The declaration granted by the learned judge was properly made, in my view, so as to make it clear to all the world what was the plaintiff's position in the eyes of the law.

Lastly comes the question whether the learned judge's award of £250 damages should be altered. It is, I think, clear that the learned judge assessed damages only up to the date of his judgment, and I do not see any sufficient ground for interfering with his award.

For these reasons I would allow the plaintiff's appeal and dismiss the cross-appeal of the National Board.

LORD COHEN. My Lords, I need not repeat the citations your Lordships have made from the scheme scheduled to the Dock Workers (Regulation of Employment) Order, 1947. The proper construction of that scheme is a matter of considerable difficulty. Thus it is far from clear whether the provisions of clause 17 (1) are intended to confer a power of terminating the contract established between the National Dock Labour Board and a registered dock worker in the reserve pool by clause 8 (2) of the scheme and to prescribe how and in what cases that power is to be exercised or whether, at any rate, so far as sub-paragraphs (*a*) and (*b*) are concerned, they are intended merely to qualify the exercise of powers conferred on the local board by clause 16 (2) (*c*) and (*d*).

I do not find it necessary to reach a conclusion on this point since it is, I think, reasonably clear from the terms of the notice given to the appellant that in dismissing him the local board, acting by its disciplinary committee, purported to act under the powers conferred upon the local board by clause 16 (2) in any case where a registered dock worker fails to comply with a provision of the scheme.

Mr. Brown submitted that the dismissal was merely an administrative act taken in pursuance of the power which he said the respondents, like any other employer, had to dismiss a workman on seven days' notice. I do not think that the respondents are in the position of an ordinary employer. The objects of the scheme are stated in clause 1 (2) as being to ensure greater regularity of employment for dock workers and to secure that an adequate number of dock workers is available for the efficient performance of dock work. The scheme contains elaborate provisions for its operation, and it seems to me clear that it would defeat the object of the scheme if the respondents could remove a dock worker from the register except for reasons recognized expressly or impliedly as valid by the scheme. The language of clause 18, which confers a right of appeal to an appeal tribunal constituted under the scheme on a registered dock worker aggrieved by action taken under certain paragraphs of clauses 15, 16 and 17, is, I think, inconsistent with the existence of any such wide power as that for which Mr. Brown contends.

He also submitted that clause 18 did not confer any right of appeal on a workman aggrieved by the termination of his contract under clause 16 (2) (*c*). It would be strange indeed if this argument were well founded. I think, however, the answer to it is that the right of appeal arises either because the effect of the termination is to disentitle the worker to payment under clause 14 and, therefore, clause 18 (1) (*a*) applies, or because, the notice of determination having been given in writing, the case falls within clause 18 (1) (*e*). It is not, I think, material to decide under which of these subclauses the case falls.

These matters are merely subsidiary to the real issue, which is whether the decision to determine the contract, having been taken not by the local board but by a disciplinary committee appointed pursuant to the resolution of the local board passed on October 2, 1947, was valid or was, as Ormerod J. declared, illegal, ultra vires and invalid.

Mr. Brown says that it was an administrative act and, like any other such act, could be delegated by the board. I doubt whether the mere fact that it was an administrative act would be conclusive of the matter, but I need not go further into this since I am satisfied that in exercising their powers under clause 16 (2) the local board were acting in a judicial capacity. I reach this conclusion from the language of clauses 15, 16, 17 and 18 read together. The significant language is, I think, as follows:

(*a*) In clause 15 (1) and (2) the words "without adequate "cause." The determination of whether there is adequate cause seems essentially a proper matter for decision judicially.

(*b*) A worker who "without adequate cause" fails to comply with certain provisions of the scheme is to be reported in writing to the local board (see clause 15 (2)).

(*c*) Similarly, a worker whose engagement is terminated by an employer and who is returned to the reserve pool is also to be reported in writing to the local board.

(*d*) Under clause 15 (4) the local board are to *consider* any such written report and to *investigate* the matter and are empowered, if they are *satisfied* that the worker is at fault in the respect alleged, to disentitle him, in whole or in part, to payment under clause 14 for the week in which the fault was committed.

(*e*) Clause 16 (2) enables action to be taken "in addition "and without prejudice to the powers conferred by clause 15" in case of failure to comply with any of the provisions of the scheme. The reference to clause 15 satisfies me that the local board, if it acts under clause 16, must investigate the matter and be satisfied that the default is proved in the same way as it must under clause 15.

(*f*) The provisions of clause 18 requiring, as I think, that if there is an appeal the local board must state the grounds on which they acted, reinforces my view that in all the decisions taken under clauses 15, 16 and 17 (1) the local board must act in a judicial manner. If this be so, it was not, I think, disputed that the local board as such must exercise the power and cannot delegate it to a committee.

I would add that the constitution of the local board which was so devised as to secure equal representation for employer and employed seems to support the view that the power conferred by clause 16 cannot be delegated. For if delegation were permissible there is nothing to control the selection of the persons to whom the power is to be delegated.

For these reasons I agree with the unanimous decision of the Court of Appeal and with your Lordships that the delegation to the disciplinary committee of the power to terminate the employment of a registered dock worker was invalid. In reaching this conclusion I am assisted by the decision of the Court of Appeal in *Barnard* v. *National Dock Labour Board.*[6] The correctness of that decision was challenged by Mr. Brown, but in my opinion his criticism is not valid.

The question next arises whether the majority of the Court of Appeal were right in refusing to the appellant the declaration that had been made by the order of Ormerod J. The appellant's right to this declaration was challenged on two grounds. First,

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[6] [1953] 2 Q.B. 18.

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it was said that he had elected to treat himself as wrongfully dismissed and to sue for damages and was thus debarred from claiming to be still in the employment of the respondents. Secondly, it was said that the power to make such a declaration should be sparingly used and that this was not an appropriate case for its exercise.

I am unable to accept either of these arguments. I cannot attach importance to the fact that the appellant sought other employment. As Ormerod J. said, he was prevented from following his employment by the act of the respondents and was left with no alternative but to try and find other employment in order to earn a living, at least until the dispute between the parties could be decided one way or the other. Mr. Brown relied also on the form of the original statement of claim in this action. On this point I agree with Jenkins L.J. that no fair reading of the pleading could be read as an election not to ask for reinstatement.

I also agree with Ormerod J. and Jenkins L.J. that this is not a case in which damages would be an adequate remedy, and I cannot usefully add anything to the reasons given by them and by your Lordships for reaching this conclusion.

Finally, Mr. Brown by way of cross-appeal urged that, if a declaration were made, the damages awarded were excessive. My Lords, I am unable to see that the trial judge erred in principle in assessing the damage, nor can I say that the amount he awarded is so excessive that an appellate tribunal would be justified in interfering with his assessment.

For these reasons I would allow the appeal and restore the judgment of the trial judge, and would dismiss the cross-appeal.

LORD KEITH OF AVONHOLM. My Lords, agreeing as I do with the conclusions reached by your Lordships, I have little to add to what has been said.

This is not a straightforward relationship of master and servant. Normally, and apart from the intervention of statute, there would never be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful but could only sound in damages.

Here we are concerned with a statutory scheme of employment. One of its objects was to do away with the evils of casual employment at the docks. Another was to secure a regular supply of labour for the shipping and unshipping of merchandise. These objects are concisely stated in the scheme, echoing the words of the statute, to be "to ensure greater regularity of "employment for dock workers and to secure that an adequate "number of dock workers is available for the efficient performance "of dock work." No employer can engage labour at the docks unless he is registered under the scheme and no dock worker can be employed at the docks unless he also is registered under the scheme. To be registered as a dock worker is, therefore, the first step to getting employment. Further, having been registered the worker comes on to the pay roll of the National Dock Labour Board, unless he is in the employ of a registered dock employer on a contract by the week or longer, whether there is work for him or not. He is in what the scheme calls the reserve pool and while in the reserve pool is in the employment of the National Dock Labour Board. While in the reserve pool a man has to be at call unless he is excused for illness or otherwise. When allocated for work at the docks he comes for the time being into the employment of the particular registered employer requiring his services, and when this employment is finished he falls back again into the reserve pool. The worker employed by a registered employer on a week's notice or longer does not properly come within the scheme apart from the fact that he must be registered. He is paid by his particular employer and is subject to his orders and control. But if he were dismissed by his employer it would seem that, as a registered dock worker, he would fall into the reserve pool and be in the employment of the National Board and subject to the directions of the local board. It is impossible, in my opinion, to equate the position of a registered dock worker in relation to the National Dock Labour Board with that of an employee under an ordinary contract of service. It is being in the scheme with all the advantages that pertain thereto that is important to the dock worker, and it is significant that the scheme places the dock worker and the employer on the same plane in this matter. Clause 11 provides: "(1) The scheme shall cease "to apply to a registered dock worker when his name has been "removed from the register or record in accordance with the "provisions of the scheme. (2) The scheme shall cease to apply "to a registered employer when his name has been removed from "the employers' register in accordance with the provisions of the "scheme." The scheme gives the dock worker a status. Unless registered he is deprived of the opportunity of carrying on what may have been his lifelong employment as a dock worker, and he has a right and interest to challenge any unlawful act that interferes with this status. If the actings here complained of were a nullity, the plaintiff, in my opinion, has a clear right to have that fact declared by the court.

I find it difficult to correlate the provisions of clauses 15, 16, 17 and 18 and to be satisfied in my mind on how they are intended to interact as between one another. But that does not, in my view, affect the fundamental question with which this appeal is concerned. It is, in my opinion, plain that the disciplinary committee acted under clause 16. I agree that such a committee had no authority to exercise the whole powers of disciplinary action conferred by that clause. The scheme committed these powers to the local board, and the local board at no stage took any part in investigating, or considering any report on, the conduct of the plaintiff, or in terminating his employment. It had no power to commit all its functions under clause 16 to any committee of its own number, or to anyone else. I do not find it necessary to consider in what respects, or to what extent, the local board would have to act in a judicial manner or to pay regard to judicial models of procedure in operating the powers of this clause. In this matter I would associate myself with the observations to be made by my noble and learned friend, Lord Somervell of Harrow, whose speech I have had the advantage of reading.

I agree that in the circumstances of this case the purported termination of the plaintiff's employment was a nullity.

LORD SOMERVELL OF HARROW. My Lords, in *Barnard* v. *National Dock Labour Board* [6] the plaintiffs claimed that notices of suspension given under clause 16 of the scheme were invalid in that they had not been given by the local board and that the local board had no power to delegate as it purported to do. The plaintiffs claimed a declaration. The board submitted, as a preliminary point, that the claim for a declaration was incompetent; that the only remedy was by certiorari. The Court of Appeal held it was a proper case for a declaration, relying on a decision of its own in *Cooper* v. *Wilson* [7] and referring to a decision of this House in *Andrews* v. *Mitchell*.[8] The remedy there sought was not a declaration but a writ of prohibition.

The principle laid down in *Cooper* v. *Wilson* [9] is, I think, accurately stated in the headnote: "Where a statutory body is "alleged to have acted without jurisdiction its decision can

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[6] [1953] 2 Q.B. 18.

[7] [1937] 2 K.B. 309.

[8] [1905] A.C. 78.

[9] [1937] 2 K.B. 309.

"properly be questioned in an action for a declaration that the "decision is null and void." In *Andrews* v. *Mitchell*[10] the remedy sought was not a declaration but a writ of prohibition. It concerned a dispute between a member and a friendly society. Under the Friendly Societies Act, 1896, such disputes were to be determined in a manner directed by the rules of the society and such decisions were to be final. Lord Halsbury referred to the inconvenience of having such disputes reinvestigated in a court of law. The courts, he said,[11] "must not insist upon a "too minute observance of the regularity of forms . . . ; on the "other hand, there are some principles of justice which it is "impossible to disregard." In that case the man expelled had never received a charge as provided by the rules. This went, as Lord Davey expressed it,[12] "to the root of the jurisdiction."

The Court of Appeal held, I think rightly, that action taken by a delegated authority when there was no power to delegate went to the root of the jurisdiction and the circumstances entitled the court, in its discretion, to grant a declaration. I agree, for the reasons that have been given by my noble and learned friend, Lord Morton of Henryton, that the disciplinary committee in the present case were purporting to act as the delegate of the local board under clauses 15 and 16 of the scheme.

In *Barnard's* case,[13] as in the present case, the functions of a local board under these provisions have been said to be judicial or quasi-judicial and this has been regarded as conclusive on the question whether the functions could be delegated.

I would like, in the first place, to associate myself with the critical observations made by Lord Greene M.R. on the expression "quasi-judicial" in *B. Johnson & Co. (Builders) Ltd.* v. *Minister of Health.*[14] It is not to be found in the statements made in this House and normally cited on this topic. I will not set them out, but I have in mind the Earl of Selborne L.C.'s opinion in *Spackman* v. *Plumstead District Board of Works*,[15] Lord Loreburn L.C.'s opinion in *Board of Education* v. *Rice*,[16] and that of Viscount Haldane L.C.

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[10] [1905] A.C. 78.

[11] Ibid. 80.

[12] Ibid. 83.

[13] [1953] 2 Q.B. 18.

[14] (1947) 177 L.T. 455, 458–459; [1947] 2 All E.R. 395.

[15] (1885) 10 App.Cas. 229, 240; 1 T.L.R. 313.

[16] [1911] A.C. 179, 182; 27 T.L.R. 378.

in *Local Government Board* v. *Arlidge*.[17] The phrase "quasi-"judicial" suggests that there is a well-marked category of activities to which certain judicial requirements attach. An examination of the cases shows, I think, that this is not so. The court has to consider whether a Minister, tribunal or board has to act "judicially" in some respect and has failed to do so. The respect in which he has to observe judicial procedure will depend on the statutory or other provisions under which the matter arises. In *Rice's* case[18] the question was whether the board had determined "questions" which, on the decision, it was their duty to determine. In *Arlidge's* case[19] one question was whether the board was entitled to withhold from the appellant the report made by its inspector after the local inquiry. Although the case was one in which it was the duty of the board to act judicially—in some respects—the proceedings were not vitiated by the fact that the official who decided the appeal saw and considered a report which was not available to the appellant. In *Errington* v. *Minister of Health*[20] the subject-matter was a clearance order made by a local authority. The owners had objected and the Minister had to hold a public inquiry and confirm or not confirm the order. This was done and the order was confirmed. The officials of the Minister had, after the inquiry, received statements from and viewed the property with representatives of the local authority in the absence of and without communicating with the owners. This vitiated the proceedings and the order was quashed.

As Lord Greene M.R. pointed out in the passage to which I have referred, the administrative and quasi-judicial functions are closely intermingled. The last two examples I have given show that in one case a document may properly be withheld from the "other side," while in another, withholding a document or conversation or its purport may vitiate the whole proceedings. The expression is "sadly lacking in precision," as Hamilton L.J. (as he then was) said of the expression "natural justice" (*Rex* v. *Local Government Board, Ex parte Arlidge*[21]).

The question in the present case is not whether the board failed to act judicially in some respect in which the rules of judicial procedure would apply to them. They failed to act at all unless they had power to delegate.

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[17] [1915] A.C. 120, 132; 30 T.L.R. 672.

[18] [1911] A.C. 179.

[19] [1915] A.C. 120.

[20] [1935] 1 K.B. 249; 51 T.L.R. 44.

[21] [1914] 1 K.B. 160, 199; 30 T.L.R. 6.

In deciding whether a "person" has power to delegate one has to consider the nature of the duty and the character of the person. Judicial authority normally cannot, of course, be delegated, though no one doubted in *Arlidge's* case [22] that the Local Government Board, which consisted of the President, the Lord President of the Council, the Secretaries of State, the Lord Privy Seal and the Chancellor of the Exchequer (Local Government Board Act, 1871), could act by officials duly deputed for the purpose, whether or not the act to be done had judicial ingredients. There are, on the other hand, many administrative duties which cannot be delegated. Appointment to an office or position is plainly an administrative act. If under a statute a duty to appoint is placed on the holder of an office, whether under the Crown or not, he would, normally, have no authority to delegate. He could take advice, of course, but he could not by a minute authorize someone else to make the appointment without further reference to him. I do not, therefore, find it necessary to consider what judicial requirements might be held implicit in the local board's proceedings under clause 16. I am, however, clear that the disciplinary powers, whether "judicial" or not, cannot be delegated. The non-entitlement to pay, the suspension, the notice or the dismissal must be a step taken by the board and not by a delegate. The penalties, in some cases, may be slight but, in some cases, very great. A man who has worked all his life in the docks may find himself precluded altogether from doing so. Today it may be easy for him to get other work, but that has not always been so. The constitution of the board also supports the conclusion. It is clearly constituted so as to inspire confidence and weigh fairly the interests of employers and employed. The purported delegation in the present case was to a representative of each side, but it is impossible to imply a limited right of delegation. *Osgood* v. *Nelson* [23] decides that in somewhat similar circumstances the appointment of a committee to take evidence and report is not in itself a delegation of authority. If there are administrative difficulties, this may be an answer to them.

On the questions whether the plaintiff had elected, whether the majority of the Court of Appeal were right in refusing a

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[22] [1915] A.C. 120.

[23] (1872) L.R. 5 H.L. 636.

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declaration, and whether the damages should be interfered with, I have nothing I wish to add to the opinion just delivered by my noble and learned friend, Lord Morton of Henryton.

Appeal dismissed. Order varied.

Solicitors: *White & Leonard for Wells, Woodford & Ackroyd, Southampton; Bell, Brodrick & Gray.*

F. C.

J. C.*

1957
July 10.

ATTORNEY-GENERAL OF CEYLON . . APPELLANT;

AND

AR. ARUNACHALAM CHETTIAR AND OTHERS RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Revenue—Estate duty—Hindu undivided family—Mitakshara—Death in 1934 *of son, one of two surviving coparceners—Ceylon assets of family business—Coparcener has no "share" in family property—His interest not "property passing" on his death—Not property of which he was "competent to dispose"—Not an interest "ceasing on his death"—Not liable to estate duty—Estate Duty Ordinance, No.* 8 *of* 1919, *ss.* 7, 8 (1) (*a*) (*b*).

Revenue—Estate duty.

A father and son, who died domiciled in India on February 23, 1938, and July 9, 1934, respectively, were, immediately before the son's death, the only living coparceners of a Hindu joint family governed by the Mitakshara system of Hindu law, which had extensive trading and other interests in India, Ceylon, and other Far Eastern countries. The father, on the son's death, became the sole surviving coparcener, but there were also female members of the Hindu undivided family who were entitled to maintenance out of the joint family property. Moreover, it was competent for the surviving widow of the son to adopt a son who would thus become a coparcener with the father, and the father himself and, after his death, his surviving widows had a similar power of adoption.

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD COHEN, LORD SOMERVELL OF HARROW and MR. L. M. D. DE SILVA.

On a claim by the appellant, the Attorney-General of Ceylon, that the son's "half share" of the assets of the business carried on by the family in Ceylon was subject to estate duty as being either "property passing on the death of the deceased" within the meaning of section 7 of the Estate Duty Ordinance, 1919, or "property "of which the deceased was at the time of his death competent to "dispose" or in which he had an interest "ceasing on his death" to the extent to which a benefit accrued or arose by the cesser of such interest within section 8 (1) (*a*) and 8 (1) (*b*) respectively of the Ordinance:—

Held, (1) that it was a misuse of language to say that a coparcener had a "half share" or any "share" of the family property; the essential nature of his interest was that whilst the family remained undivided he could not predicate that he had a certain definite share (*Appovier* v. *Rama Subba Aiyan* (1866) 11 Moo.I.A. 75, 89). And although a coparcener had rights, such as those of partition and alienation—which gave colour to the view that he had what might be called a "share"—as against that the karta (head of the family) had the duty, inter alia, to maintain out of the family property not only the coparceners but the female members of the family, and to provide for such family purposes as education, marriage and religious ceremonies. In such circumstances it could not be said that the son had a "share" of the property which "passed" on his death within section 7.

(2) That, although the son could at any time during his lifetime have obtained his share of the family property by partition, it would be little less than absurd to stretch "competency to dispose" in section 8 (1) (*a*) to the extent of assuming that the son would take the necessary preliminary step of separating from his family—a step which for economic, sentimental and traditional reasons might be utterly repugnant to him. Further, if and in so far as "competency to dispose" rested upon a right to obtain partition, the family property included interests outside Ceylon, and it could not be assumed in favour of the appellant that, had there been a partition, any part of the property in Ceylon would have fallen to the share of the son. It could not be said, therefore, that the son was at or immediately before his death "competent to dispose" of the "half share" of the Ceylon property of the undivided family.

(3) That for section 8 (1) (*b*) to be applicable there must be not only a cesser of interest in property, but also a benefit arising by such cesser; and, further, the benefit, as provided by section 17 (6) of the Ordinance, must be capable of valuation by reference to the income of the property which the deceased had enjoyed. Here, the son merely had a right to be maintained by the karta out of the common fund to an extent in the karta's absolute discretion, and there was no basis of valuation which in relation to such an "interest" would conform to the scheme prescribed by section 17 (6). Nor, upon a cesser of that "interest" could a "benefit" of any value be said to have accrued to the surviving coparcener when the son's "interest" lapsed.

Accordingly, the claim to estate duty could not be upheld either under section 7 or section 8 (1) (*a*) or (*b*).

Judgment of the Supreme Court of Ceylon (1953) 55 C.N.L.R. 481 affirmed.

APPEAL (No. 16 of 1955) from a judgment and decree of the Supreme Court of Ceylon (October 12, 1953) affirming a judgment and order of the District Court of Colombo (November 8, 1949) whereby an assessment to estate duty under the provisions of the Estate Duty Ordinance, 1919, in respect of the estate in Ceylon of one Rm. Ar. Ar. Rm. Arunachalam Chettiar was set aside and the amount of estate duty paid ordered to be refunded.

The appeal was heard together with appeal No. 17 of 1955, reported immediately hereafter.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: This appeal and the succeeding appeal, No. 17 of 1955, from the same court, have certain facts in common which will be stated now and will not be repeated in the second appeal.

Both appeals raised questions as to the exigibility of estate duty under the relevant Ordinances of Ceylon upon the death, first, of one Rm. Ar. Ar. Rm. Arunachalam Chettiar and, second, of his father, one Rm. Ar. Ar. Arunachalam Chettiar. These gentlemen will be called "the son" and "the father."

The father and the son were members of a Hindu community known as Nattukottai Chettiars who inhabit certain districts of Southern India and were governed by the Mitakshara system of Hindu law in matters relating to inheritance, succession, adoption, marriage and other matters. They were also coparcenary members of a joint Hindu family which had extensive trading and other interests in India, Ceylon, and other far Eastern countries. Immediately before July 9, 1934, when the son died, he and the father were the only living coparceners. The father then became the sole surviving coparcener of the family. But there were females also who, though they had not the rights of coparceners, yet had rights of residence in, and maintenance out of, the joint family property and were in all respects members of the Hindu undivided family of which the father and son were coparceners. Moreover, it was competent for the surviving widow of the son to adopt a son who would thus become a coparcener with the father, and the father himself during his life and after his death his surviving widows had a similar power of adoption. The following

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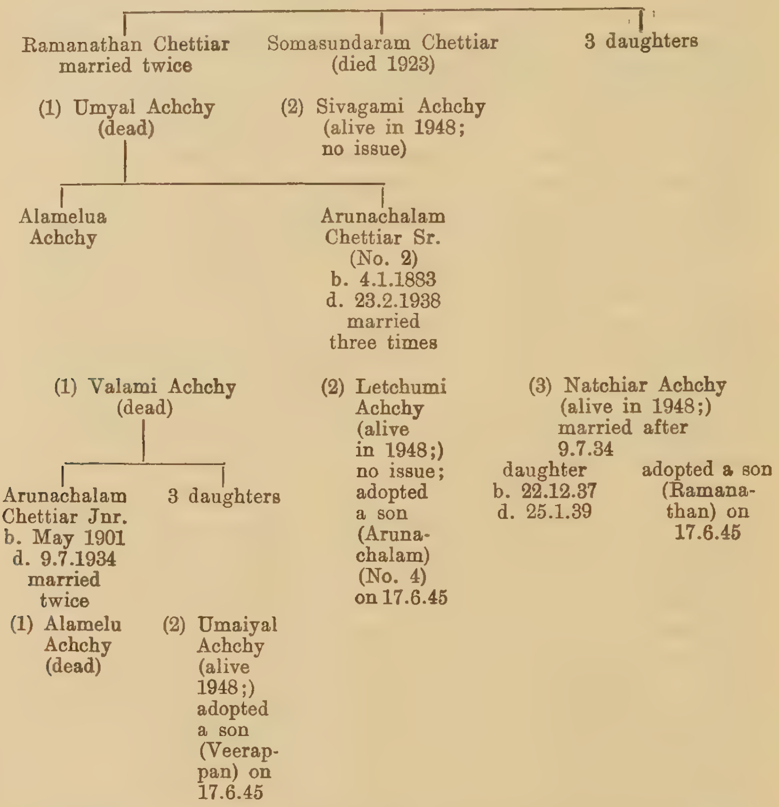
genealogical tree shows not only the members of the family but the manner in which those powers of adoption were exercised.

ARUNACHALAM CHETTIAR (NO. 1).


Ramanathan Chettiar married twice
Somasundaram Chettiar (died 1923)
3 daughters
(1) Umyal Achchy (dead)
(2) Sivagami Achchy (alive in 1948; no issue)
Alamelua Achchy
Arunachalam Chettiar Sr. (No. 2) b. 4.1.1883 d. 23.2.1938 married three times
(1) Valami Achchy (dead)
(2) Letchumi Achchy (alive in 1948;) no issue; adopted a son (Arunachalam) (No. 4) on 17.6.45
(3) Natchiar Achchy (alive in 1948;) married after 9.7.34
daughter b. 22.12.37 d. 25.1.39
adopted a son (Ramanathan) on 17.6.45
Arunachalam Chettiar Jnr. b. May 1901 d. 9.7.1934 married twice
3 daughters
(1) Alamelu Achchy (dead)
(2) Umaiyal Achchy (alive 1948;) adopted a son (Veerappan) on 17.6.45

The son, as has been said, died on July 9, 1934. The father died on February 23, 1938. Both of them died in India where they were domiciled.

On October 31, 1938, the Assessor of Estate Duty, Colombo, served on the administrators of the estate of the father a notice of assessment that in respect of the estate of the son estate duty payable by them had been assessed at a figure of Rs.223,493.70. This sum was by amended notices reduced to Rs. 221,743. From the notices it was clear that the assessment was in respect of what was described as the " deceased's half share " of the assets of the business carried on by the family in Ceylon and of certain other assets. Objection was duly taken to the assessment but was overruled by the Commissioner of Estate Duty. The matter was then

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appealed to the District Court of Colombo. The District Judge allowed the appeal, and an appeal from his decision by the present appellant, the Attorney-General of Ceylon, to the Supreme Court of Ceylon (Gratiaen and Gunasekara JJ.) was dismissed.

At the date of the son's death estate duty was imposed by the Estate Duty Ordinance, No. 8 of 1919, which in all material respects was a faithful copy of the Finance Act, 1894, of the United Kingdom. The following are the provisions of the Ordinance which are relevant to this appeal.

"THE ESTATE DUTY ORDINANCE NO. 8 OF 1919.

"2.—(1) In this Ordinance, unless the context otherwise "requires, the term—

"'Estate duty' means the duty imposed under the provisions "of this Ordinance in case of the death of any person dying on "or after the commencement* of this Ordinance.

"'Deceased' means any person dying on or after the com- "mencement of this Ordinance. . . .

"'Property' includes movable and immovable property of "any kind situate or being in the Colony and the proceeds of sale "thereof respectively, and any money or investment for the time "being representing the proceeds of sale. . . .

"'Property passing on the death' includes property passing "either immediately on the death or after any interval, either "certainly or contingently, and either originally or by way of "substitutive limitation; and the expression 'on the death' "includes 'at a time ascertainable only by reference to the "'death.'"

"(2) For the purposes of this Ordinance—(*a*) A person shall "be deemed competent to dispose of property if he has such an "estate or interest therein or such general power as would, if he "were sui juris, enable him to dispose of the property; and the "expression 'general power' includes every power or authority "enabling the donee or other holder thereof to appoint or dispose "of property as he thinks fit, whether exercisable by instrument "inter vivos or by will, or both, but exclusive of any power "exercisable in a fiduciary capacity under a disposition not made "by himself."

"7. In the case of every person dying after the commence- "ment of this Ordinance, there shall, save as hereinafter "expressly provided, be levied and paid, upon the value of all

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* July 1, 1919.

"property settled or not settled, which passes on the death of "such person, a duty called 'estate duty,' at the graduated rates "set forth in the schedule to this Ordinance. 8.—(1) Property "passing on the death of the deceased shall be deemed to include "the property following, that is to say:—(*a*) Property of which "the deceased was at the time of his death competent to dispose. "(*b*) Property in which the deceased or any other person had an "interest ceasing on the death of the deceased to the extent to "which a benefit accrues or arises by the cesser of such "interest. . . ."

"17.—(6) The value of the benefit accruing or arising from "the cesser of an interest ceasing on the death of the deceased "shall—(*a*) If the interest extended to the whole income of the "property, be the value of that property; and (*b*) If the interest "extended to less than the whole income of the property, be such "proportion of the value of the property as corresponds to "the proportion of the income which passes on the cesser of the "interest."

1957. May 20, 21, 22, 23, 27, 28, 29, 30; June 3. *Sir Frank Soskice Q.C.*, *John Senter Q.C.*, *R. K. Handoo* and *J. Bisschop* for the appellant. In this argument this appeal and that following, No. 17 of 1955, will be dealt with simultaneously, though the issues are not identical. The first appeal raises the questions: was the son's estate property which fell within the description of property passing on the death of the deceased within the meaning of section 7 of the Ceylon Estate Duty Ordinance, 1919; or, in the alternative, was it property of which the deceased was "competent to dispose" within the meaning of section 8 (1) (*a*) of that Ordinance, or, in the further alternative, was it property in which the deceased had an interest ceasing on his death within the meaning of section 8 (1) (*b*)? In the son's case there are two other questions: (1) Whether such part of the estate as consisted of immovable property situate in Ceylon, property governed by the lex loci rei sitae, that is, Ceylon, passes under section 7 of the Ceylon Wills Ordinance or, alternatively, passes because of the provisions of section 18 of the Partition Ordinance to the son's heirs. (2) Are the respondents the proper persons to be assessed in respect of duty due on his estate? It is submitted that they are.

In the father's case (appeal No. 17 of 1955) the main question will be whether by virtue of section 73 of the Estate Duty Ordinance, 1938, which replaced the Ordinance of 1919, there was an exemption in the case of the property in his hands. The appellant contends that it passed as not being joint property of an undivided Hindu family. It may be that it had been such property, but it was certainly not joint property of an undivided Hindu family, for at that time he was the sole surviving coparcener.

The case in toto raises a question as to what is the nature of the property rights of a coparcener member of an undivided Hindu family. This family was governed by the Mitakshara school of Hindu law as recognized in Madras. In Mitakshara law in no sense does the undivided family own property; one has to distinguish the narrower body of coparcener members, who are the persons who jointly own ancestral family property, and there are certain obligations attached to it. What is crucial is that they have the right at any moment to call for a partition, and thereupon they acquire as their own property that portion which either by agreement between their fellow coparceners or by a partition decree is allotted to them. The following 16 propositions are submitted with regard to coparcenary property:

(1) A joint Hindu family or a Hindu undivided family consists of all persons lineally descended from a common ancestor, inclusive of their wives and unmarried daughters. A daughter ceases to be a member of her father's family on marriage and becomes a member of her husband's family.

(2) A Hindu coparcenary is a much narrower body than a Hindu undivided family. It consists of a common male ancestor with his lineal descendants in the male line within four degrees counting from and inclusive of such ancestor, or three degrees exclusive of him; in other words, of a man, his sons, grandsons and great-grandsons. The members of a Hindu coparcenary acquire by birth the exclusive right to enjoy and hold the joint family property, which is vested in them alone. An adopted son in practice is on exactly the same footing as a natural son.

(3) In accordance with the recent trend of decisions it would seem that females by themselves can, at any rate in exceptional circumstances, constitute a joint Hindu family.

(4) Coparcenary property, sometimes loosely called family property or joint family property, is property which is owned by members of the coparcenary, all of whom must be males; women cannot be members of a Hindu Mitakshara coparcenary.

(5) The Mitakshara coparcenary is not identical with the coparcenary of English law. The terms "joint family property" or "coparcenary property" do not always mean what joint ownership in English law means.

(6) There is community of interest and unity of possession between the members of a coparcenary, and on the death of one the surviving coparceners take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession. (This is subject to certain rights conferred on a widow under the Hindu Women's Right to Property Act, 1937.)

(7) The coparcenary property of an undivided family is managed by the Karta, who is usually the senior coparcener, e.g., the father.

(8) A coparcener may at any time by any definite and unequivocal indication of his intention to separate from the other members of the family effect a partition of his joint status, and thereupon the joint status will be severed and his right to obtain and possess his share will be absolute whether or not the others agree to the separation. The right to partition may be enforced by an action in court or given effect to by agreement or arbitration.

(9) The effect of a partition is to dissolve the coparcenary, with the result that the separating members thenceforth hold their respective shares as their separate property, and the share of each will pass on his death to his heirs.

(10) According to the Mitakshara as administered in Madras a coparcener in an undivided family may sell, mortgage or otherwise alienate for value his undivided interest in coparcenary property without the consent of the other coparceners, and on such alienation the alienee acquires an equity to stand in the shoes of the vendor and to work out his rights by means of a partition.

(11) A coparcener cannot without the concurrence of his other coparceners make a gift of his own undivided interest, and he cannot in any circumstances make a demise of such interest by will.

(12) A coparcener's undivided interest in the coparcenary property may during his lifetime be seized and sold in execution of his separate debt. It may also be sold after his death if it was attached during his lifetime. The purchaser of the interest in the execution sale acquires such interest with the power of ascertaining and realizing it by a partition.

(13) The share which an alienee of a coparcener's interest acquires by the alienation is that which the alienor was entitled to on the date of the alienation.

(14) A coparcener cannot alienate his undivided share in the coparcenary property in any other way than as previously

mentioned except with the consent of the other coparceners and subject to his inability to dispose of his undivided interest by will even with such consent.

(15) All the members of a Hindu undivided family, i.e., the coparceners and the women and children, have a right to be maintained out of the coparcenary property, the amount of maintenance in each case being subject to the Karta's discretion, which should be exercised having regard to all the facts. The right to maintenance, so far at any rate as wives, daughters and minor sons are concerned, is only a personal right.

(16) A sole surviving member of a former coparcenary, shortly called a sole surviving coparcener, can do what he likes with the coparcenary property, i.e., he may sell it or mortgage it or make a gift of it or dispose of it by will—he has the right to alienate it in any way, subject to the following rules: (i) His personal liability to maintain those entitled to maintenance will be unaffected, and their right can sometimes be made a charge on the property. (ii) If a son is born into the family by natural birth or adoption the property will become from that time the joint property of the coparcener and the new son. (iii) The new son's interest will be subject to any alienation of any part of the property already made by the sole surviving coparcener before the arrival of the newcomer.

The appellant attaches far more importance to the right to claim a partition than to any of the other rights of a coparcener. Support for the above propositions is to be found in Mulla's Principles of Hindu Law, 8th ed., paras. 212–215, 217, 220, 221, 223, 235–238, 303, 307, 368; and in Mayne's Hindu Law and Usage, 11th ed., paras. 263–266, 269, 298, 299, 301, 303, 321, 379, 381, 382, 386, 388–390, 393, 418, 447–450, 681, 684, 685, 695, 705, 832.

The questions and the appellant's answers in regard, first, to the son's case, are: (1) Did property pass under section 7? Yes, because on death there was a change in the beneficial interests affecting the property as a whole. It is sufficient to point to the fact (apart from other considerations) that before the son's death the coparceners could not in any way (without partition) alienate the property except for family necessities, religious purposes, etc., whereas after death the father alone could dispose of the whole of the beneficial interest in the whole of the property by will. See Hanson's Death Duties, 10th ed., p. 189, para. 528, the effect of which is that, for a passing to take place, the whole right of enjoyment must shift from beneficiaries entitled thereto before the death to different beneficiaries after the death (even though some beneficiaries before and after the death may be the same). The Supreme Court's view that there was not a "passing" because there was a hedge of trustees which held the whole beneficial interest for the family would, it is submitted, only be right if the family was in the true sense a legal corporation (independent of its members) the identity of which was in no sense affected by the death of a coparcener.

(2) If the answer to question (1) is No, then was the son competent to dispose of the property within section 8 (1) (*a*)? Yes, because (a) he was in a position to make his own the share which he would have got on a partition: *In re Penrose* [1]; *In re Parsons* [2]; Hanson's Death Duties, 10th ed., para. 67; (b) apart from his right to claim partition, his power to alienate his share for value, to mortgage it for a loan to himself, to render it liable to be taken in execution for his personal debts is in degree a sufficient power of alienation to make him competent to dispose.

(3) If the answer to the first two questions is No, was the son possessed of an interest which ceased within section 8 (1) (*b*)? He was, namely, the interest he possessed consisting in his right by partition to make half of the property his own. To the extent of this half on the son's death the father benefited. For the purpose of valuation under section 17 (6) this half would have been represented in terms of income by half the income.

(4) In any event should that part of the estate which consisted of immovable property in Ceylon be treated as passing under section 7 of the Ceylon Wills Ordinance and section 18 of the Partition Ordinance to the son's heirs? Yes, because the Ceylon legislation so enacts.

(5) Can the present respondents be assessed? Yes, because (a) if the property passed under section 7, section 25 applies, since the father's administrators took possession of this property; (b) the same result follows if the property is "deemed to pass" under section 8 (1) (*a*) or (*b*), because "property passing on the "death" is defined in section 77 (1) as including property which is "deemed to pass."

The questions and the appellant's answers in the case of the father are: (1) It being not contested that on the father's death he was "competent to dispose," was the property exempted under section 73 of the Ordinance of 1938? No, because the property was the father's property. Although there was a Hindu undivided family, it was not property of that family. In any event it was not joint property of that family. (2) Were the Mysore bonds assessable as part of the Ceylon estate? Yes; there is a finding of the District Court in the appellant's favour; the Supreme Court did not deal with this point.

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[1] [1933] Ch. 793; 49 T.L.R. 285.

[2] [1943] Ch. 12; 59 T.L.R. 19; [1942] 2 All E.R. 496.

The next step is to examine the Indian authorities. In *Katama Natchier* v. *Rajah of Shivagunga* [3] it is said that there is community of interest and unity of possession between the coparceners. *Appovier* v. *Rama Subba Aiyan* [4] shows that "no "individual member of that [undivided] family whilst it remains "undivided can predicate of the joint and undivided property that "he . . . has a certain definite share." *Rajah Ram Narain Singh* v. *Pertum Singh* [5] refers to the character of the family as a corporation, and to the distinction between joint and separate property of a Hindu undivided family. The acid test is what rights a coparcener has: *Debi Parshad* v. *Thakur Dial.*[6] *Deendyal Lal* v. *Jugdeep Narain Singh* [7] does, in dealing with the rights of an execution creditor, rather strongly emphasize that it would be wrong to regard the coparcener as having less than what may be called a right, title or interest in a share of the joint estate; that is applicable with reference to his right to ask for partition. *Appa Rao* v. *Court of Wards* [8] shows that a dispossessed coparcener can recover mesne profits as from the date of the ouster of him from the family property. *Baboo Hurdey Narain Sahu* v. *Pundit Baboo Rooder Perkash Misser* [9] gives the form of a declaration in favour of an execution creditor; it is not argued that an execution creditor gets any more than a chose in action —a right to demand a partition.

The position of the Karta is considered in *Krishna* v. *Subbanna.*[10] *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai* [11] refers to the family as a "unit." [*Chandra* v. *Gojarabai* [12] was also referred to.] In *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* [13] it was said that a legal estate was transferred by a coparcener to an alienee; but that statement was later regarded as obiter. *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* [14] was cited in evidence for the proposition that it is incorrect to regard the family as a legal entity. *Sri Rajah Venkata Narasimha Appa Row* v. *Sri Rajah Rangayya*

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[3] (1864) 9 Moo.I.A. 539, 607, 610.
[4] (1866) 11 Moo.I.A. 75, 80, 89.
[5] (1873) 20 Suth.W.R. 189, 191.
[6] (1875) I.L.R. 1 All. 105.
[7] (1877) L.R. 4 I.A. 247, 251.
[8] (1882) I.L.R. 5 Mad.(P.C.) 236.
[9] (1883) L.R. 11 I.A. 26, 30.
[10] (1884) I.L.R. 7 Mad. 564, 568.
[11] (1894) I.L.R. 17 Mad. 316, 327.
[12] (1890) I.L.R. 14 Bom. 463, 470.
[13] (1902) I.L.R. 25 Mad. 690, 716.
[14] (1904) I.L.R. 28 Mad. 344.

Appa Row [15] shows, in relation to the "passing" point under section 7, that on the death of the son there was a change of ownership; it is also cited to show that the description of the sole coparcener's right in relation to property is such as not to come within section 73. *Chinnu Pillai* v. *Kalimuthu Chetti* [16] lays down the proposition that the alienee's right—in that case a mortgagee's—is crystallized as at the date of the alienation. The *Maharajah of Bobbili's* case [17] comments on what was said in the earlier cases. *Baijnath Prasad Singh* v. *Tej Bali Singh* [18] refers to the meaning of coparcener. In *Ramalinga Annavi* v. *Narayana Annavi* [19] there is a specific statement that a definite intimation by a coparcener creates a division of interest as at the moment of intimation. *Sankaralinga* v. *Official Receiver of Tinnevelly* [20] deals with the rights of an execution creditor—he can ask for a partition as the coparcener himself could have done. *Protap Chandra Deo* v. *Jagadish Chandra Deo* [21] is a case in which, in relation to a coparcener, the Board used the expression his "present ownership."

The next case, *Veeranna* v. *Sayamma*,[22] relates again to the position of the last surviving coparcener, and is relied on as emphasizing his sole and absolute interest in the coparcenary property—and what he does with it cannot be challenged even by a son subsequently born. That case goes a long way to establishing the appellant's submissions on section 73. *Narayana Sah* v. *Sankar Sah* [23] is cited on the question of a coparcener having something to sell, "some real and definite interest in the "property." See also *Shankar* v. *Daooji Misir*.[24] The next two cases are important from the appellant's point of view, *Kalyanji Vithaldas* v. *Commissioner of Income Tax, Bengal*,[25] which was followed in *Commissioner of Income Tax, Bombay* v. *A. P. Swamy*,[26] in which it was said that the income can be taxed as his own individual income. In *Sirikant Lal* v. *Sidheshwari Prasad* [27] a Hindu undivided family is again referred to as a juristic person, but it appears from the judgment that it cannot have been meant in the sense of an individual body. *Meenakshi Achi* v. *Ramaswami Chettiar* [28] refers again to the absolute ownership of the sole surviving coparcener. *Anant Bhikappa Patil* v. *Shankar Ramchandra Patil*[29] is cited for the proposition that the adoption by a widow of a deceased coparcener of a son to her deceased husband divests the title of more remote collaterals to whom the property would otherwise have gone on the death of the last coparcener by succession. *Commissioner of Income Tax* v. *Dewan Bahadur Dewan Krishna Kishore*[30] was referred to in evidence for the proposition that the liability to maintain the members of the family is a personal liability only. *In re Hindu Women's Rights to Property Act, 1937*,[31] shows that it is not accurate to speak of mere extinction of a coparcener's rights on his death; certain consequences follow even after his death. *Ramaswamy* v. *Income Tax Commissioner*,[32] an income tax case which concerned the parties in this case, does not add much. In *Umayal Achi* v. *Lakshmi Achi*[33] it was held that the father's property in this case was within the meaning of the Hindu Women's Rights to Property Act not separate property. The question of the widow's right to maintenance was discussed in *Dan Kuer* v. *Sarla Devi*[34] and *Commissioner of Income Tax, Central and United Provinces* v. *Bhagwati*[35]; she has a right in personam, which she can ask to be made a charge by the court —that right is in a sense a species of execution. *Peramanayakam* v. *Sivaraman*[36] is the latest decision showing that the rights of alienees crystallize as at the time of alienation, and subsequent births and deaths do not affect what the alienee has got; that is relevant in considering whether a coparcener has a sufficient power of alienation to warrant him "competent to dispose."

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[15] (1906) I.L.R. 29 Mad. 437, 447.

[16] (1912) I.L.R. 35 Mad. 47.

[17] A.I.R. (1915) Mad. 453.

[18] (1921) I.L.R. 43 All. (P.C.) 228, 243.

[19] (1922) L.R. 49 I.A. 168, 173.

[20] A.I.R. (1926) Mad. 72.

[21] (1927) L.R. 54 I.A. 289, 295.

[22] (1928) I.L.R. 52 Mad. 398, 420.

[23] (1929) I.L.R. 53 Mad. 1, 12.

[24] (1931) L.R. 58 I.A. 206.

[25] (1937) L.R. 64 I.A. 28.

[26] A.I.R. (1937) P.C. 239.

[27] A.I.R. (1937) Pat. 455.

[28] A.I.R. (1939) Mad. 552.

That concludes the Indian cases. The actual decision in the Ceylon case of *Peria Karuppam Chettiar* v. *Commissioner of Stamps*[37] can be distinguished from the present case; see also *N. Ramaswamy Chettiar* v. *Attorney-General.*[38] English cases support the view that there was a passing under section 7 of the Ordinance which would have been a passing under section 1 of the Finance Act, 1894. Sections 1 and 2 of the Act of 1894 are to all intents and purposes the same as sections 7 and 8 of the Ceylon Ordinance. The first case is *Earl Cowley* v. *Inland Revenue Commissioners.*[39] As to what is and what is not a passing, Hanson's Death Duties, p. 176, para. 508, summarizes the principles and cites *Dunderdale's Trustees* v. *Inland Revenue*,[40] which shows that the property was looked at and taken as at the moment of death, notwithstanding that there was a possibility of its being altered or reduced in amount at a later stage when a particular person died. The court said that what may happen afterwards must be disregarded. And in the present case one must disregard the fact that on the son's death the property may pass, as is submitted, almost absolutely, into the possession of the father and might, owing to a subsequent death or adoption, have changed its character. The mere fact that it may change its character is irrelevant. On the son's death it is changed from joint to separate property, and it is irrelevant that although it has become separate property in the hands of the father something may thereafter happen, such as an adoption, which may revert it to joint family property. It is submitted that the property as a whole passed on the son's death. The beneficial enjoyment by the father was wholly different in a number of incidents after the son's death from his joint enjoyment before the son's death—e.g., he could dispose of it by will. [Reference was also made to *Attorney-General* v. *Milne*,[41] *Nevill* v. *Inland Revenue Commissioners*[42] and *Adamson* v. *Attorney-General*,[43] where what constitutes a passing is illustrated]; see also *Attorney-General* v. *Lloyds Bank Ltd.*[44]

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[29] (1943) L.R. 70 I.A. 232.
[30] (1941) L.R. 68 I.A. 155.
[31] A.I.R. (1941) Fed.Ct. 72, 77.
[32] A.I.R. (1945) Mad. 122.
[33] A.I.R. (1945) Fed.Ct. 25.
[34] (1946) L.R. 73 I.A. 208.
[35] (1947) L.R. 74 I.A. 142.
[36] A.I.R. (1952) Mad. 419.
[37] (1936) 38 C.N.L.R. 201.
[38] (1937) 38 C.N.L.R. 313.
[39] [1899] A.C. 198; 15 T.L.R. 270.

Next, a passing is not prevented by the circumstance that some of the beneficial holders after the death are the same persons as one or more of the beneficial holders before the death: *Sir S. E. Scott, Bt., and Coutts & Co.* v. *Inland Revenue Commissioners*[45]—there is a very close analogy between that case and the present; *Burrell and Kinnaird* v. *Attorney-General*,[46] which it is sought to equate to the present case. Reliance is placed principally on *In re Hodson's Settlement*[47] as establishing the appellant's proposition; in the present case there was a clear change in the beneficial rights from before and after the death; so, it is submitted, there was a passing.

That concludes the argument under section 7. If the appellant is not allowed to take the "passing of the whole property" point, it is submitted, as an alternative, that if the whole passes, the whole includes the half, and that in the alternative the half passes.

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[40] 1935 S.C. 169.

[41] [1914] A.C. 765, 778; 30 T.L.R. 476.

[42] [1924] A.C. 385, 389; 40 T.L.R. 341.

[43] [1933] A.C. 257, 276; 49 T.L.R. 169.

[44] [1935] A.C. 382, 397.

[45] [1937] A.C. 174, 182; 53 T.L.R. 130.

[46] [1937] A.C. 286, 299.

[47] [1939] Ch. 343, 367; 55 T.L.R. 357.

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[VISCOUNT SIMONDS intimated that their Lordships were of the opinion that it was not open to the appellant to argue that the whole property passed.]

With regard to section 8 (1) (*a*), here the son was " competent " to dispose " of that which on a partition would become his: *In re Penrose* [48]; *In re Parsons*.[49] The courts in Ceylon can only look at the Ceylon estate. Inasmuch as he can sell or mortgage it to anyone he pleases he can, within the meaning of the language in *Attorney-General* v. *Astor*,[50] dispose of it " at his own will." [Reference was also made to Dymond's Death Duties, 12th ed., p. 191, Green's Death Duties, 3rd ed., p. 49, and Hanson's Death Duties, 10th ed., p. 43.] A joint coparcener—the phrase in the books is " joint tenants "—is a person who is, within the meaning of section 8 (1) (*a*), " competent to dispose."

It is submitted next that there was a passing under section 8 (1) (*b*)—an interest that ceased on death. The portion of the income which passed on the cesser of the interest was one half; after the son's death the income was solely owned by the father, subject to incumbrances. The valuation provisions of section 17 (6) of the Ordinance of 1919 can be applied, and the appellant is entitled to rely on section 8 (1) (*b*).

If one considers that portion of the property which consists of immovables, the express terms of the Ceylon legislation are to the effect that it is to devolve by descent and form part of the estate of the joint tenant who dies. It has been established on the evidence that the land was in effect held jointly by the father and son within the meaning of section 7 of the Wills Ordinance and section 18 of the Partition Ordinance, and it is to devolve in accordance with those sections.

With regard to whether the present respondents can be properly assessed, section 25 of the Ordinance of 1938 is sufficient for the appellant's purposes here. [Green's Death Duties, 3rd ed., p. 220, was referred to.] This is a case in which the interest in the property has devolved upon the present administrators, and accordingly they are liable to pay.

The final question is whether, it not being contested that there was a passing on the death of the father, the result ensues that the estate is taxable or whether it is excluded from taxation under the provisions of section 73 of the Ordinance of 1938. The Supreme Court judgment goes in the face of the authorities; the District Judge was right in saying that section 73 was not apposite to cover the property in the hands of the father.

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[48] [1933] Ch. 793; 49 T.L.R. 285.

[49] [1943] Ch. 12, 15; 59 T.L.R. 19; [1942] 2 All E.R. 496.

[50] [1923] 2 K.B. 157, 160; 39 T.L.R. 256.

D. N. Pritt Q.C., *Ralph Millner*, *J. D. M. Derrett* and *Sirimevan Amerasinghe* for the respondents. With regard, first, to the appellant's 16 propositions; the whole of proposition (1) is agreed, as is the first part of proposition (2). The whole family enjoys the property; it is certainly held in some sense by the members of the coparcenary, but one should be cautious about the word "vested," because the English conception of a vested interest in the members of a coparcenary is erroneous. Proposition (3) puts it much too cautiously; and it is submitted that females by themselves can and do constitute a joint Hindu family. The objection to proposition (4) is the word "owned," because any English conception of ownership is ruled out. The view that women cannot be members of a Hindu coparcenary may have to be modified since the Hindu Women's Right to Property Act, 1937. Proposition (5) would be better without the word "always." The word "take" in proposition (6) may not be right—it is not really taking, because they had it already. Proposition (7) is agreed. In broad generality proposition (8) is accepted, but with certain qualifications. Words which, it is submitted, more correctly state the true position are: "and "thereupon he will have a right to receive a share which, when "it is finally allotted to him, will be then something movable "or immovable, situate somewhere, which he will then own and "possess as his separate property," unless, as very often happens, it immediately becomes joint family property of a new Hindu undivided family.

The latter part of proposition (9) is wrong without qualification. Proposition (10) puts things much too broadly. The point should be stated historically, that is to say, that, according to the Mitakshara as administered in Madras, in cases of execution, mortgages or sales the courts, when someone has given value in any of these ways, have reimbursed him by a somewhat complicated method of using the coparcener's right to claim possession. Proposition (11) is broadly accepted, with two glosses—it should not be called "his own undivided interest," and the true reason why he cannot devise it by will is because it does not survive him. The comments on proposition (12) are the same as those on proposition (10). Broadly, proposition (13) is agreed, but it does not matter for the respondents' purposes. Nothing need

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be said about proposition (14). With regard to the last part of proposition (15)—" a personal right "—it can be crystallized into a mere right of charge by a wife. Anyone entitled to maintenance can have a charge. Obviously it is not a personal right in the sense in which an English conveyancer would use the phrase. Proposition (16) is the only one which specifically refers to the father's case and his position as a sole surviving coparcener, and it is submitted that it is wrong in many respects, in particular as to the third item. A seventeenth proposition might be that a joint family is not truly a corporation.

Three counter-propositions in answer to those 16 propositions are: (1) There was a Hindu undivided family in existence in the period between the deaths of the son and the father—1934 to 1938—and, indeed, there was a Hindu undivided family after the father died. (2) The property which had previously to the death of the son been joint family property of the Hindu undivided family was, after the death of the son, the joint family property of a Hindu undivided family and not the separate property of the sole surviving coparcener. (3) Any newcomer brought in by birth or adoption, even after the death of the sole surviving coparcener, becomes a member of the Hindu undivided family and of the coparcenary with effect from the date of the death as fully as if he had been born or adopted in the lifetime of the sole surviving coparcener.

With regard to what has been loosely called the share of a coparcener, it is submitted that the position of a coparcener who has not taken any steps towards partition in relation to his interest is highly indefinite and indeterminate. Secondly, even if he has intimated his demand for partition, his position remains indefinite and indeterminate until the partition is actually worked out. This bears on the argument about " competent to dispose." So long as he remains undivided, as the son did all through his life, and, as is submitted, the father did, he was no more than a person who would be entitled, if he first gave notice of partition and then went through family discussions, arbitration or litigation, consideration of all proper debits and credits, to receive a portion of a number of assets situated in various countries. Even if he has given notice, nobody can state with the slightest certitude what arithmetically he will ultimately get. There is an element of something notional about it; there was no question of his wanting partition. The claim of the appellant is that the coparcener must be thought of for the purposes of tax as a person who is able to partition and is therefore " competent to dispose."

The textbooks and the authorities say that what is or had been Hindu family property is not, when it comes into the hands of the sole surviving coparcener, his separate property. A consideration of the substantial restrictions on his power to deal with the property shows that it cannot be separate property and must be joint. There is implied in that that for any purposes with which this litigation is concerned property is either separate or joint family property; there is nothing in between. [Reference was made to Mulla's Principles of Hindu Law, paras. 257, 368, 230, and to *Commissioner of Income Tax* v. *Dewan Bahadur Dewan Krishna Kishore*,[51] which had to be applied remembering that there it was an impartible estate.] The sole surviving coparcener, although he has the right to do a great many things with the property, including to devise it by will, has always to bear in mind the fact, and anybody taking from him has to face the fact, that should he continue in the normal Hindu way of life as a potential joint family man, another coparcener may be born or adopted and then the whole special position of the sole surviving coparcener disappears. That includes the fact that long after his death another coparcener may appear and relate back to his death through adoption of a son by his or his son's or another coparcener's widow, and that son has to be treated as having been a coparcener from the time of his death—so that the father never was the sole surviving coparcener at all—and the newcomer has exactly the same rights as he would have had in the lifetime of the sole surviving coparcener to recall any disposition made of the property which if he had been there he could have objected to. *Anant Bhikappa Patil* v. *Shankar Ramchandra Patil*[52] establishes that the rights of an adopted son will override wills or intestacies or any other active or passive disposition of a sole surviving coparcener. It cannot be argued after that that in the circumstances of the present case after the death of the son the father could claim either that there was not a Hindu undivided family or that this property was not joint family property of this family. It is submitted that *Veeranna* v. *Sayamma*[53] is absolutely inconsistent with *Anant Bhikappa Patil's* case.[54]

Approaching now the cases of the father and the son separately, it is to be noted by way of preliminary observations, first, that revenue statutes must be construed with a fair measure of strictness, and, secondly, that when legislation not mentioning Hindu undivided families is said to apply to them, it must be applied with reasonable strictness in accordance with its words, and the court should not strain to apply it to a situation to which it does not properly belong.

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[51] L.R. 68 I.A. 155, 167.

[52] L.R. 70 I.A. 232, 238.

[53] I.L.R. 52 Mad. 398.

[54] L.R. 70 I.A. 232.

The father's case consists of one main point under section 73 of the Ordinance of 1938, and the question of the Mysore securities. That when the father died he was a member of a Hindu undivided family is, it is submitted, not open to doubt. Therefore the question is whether this property was the joint property of that Hindu family—which is the same as saying joint family property of the family. The appellant says that it was not established that the property was the joint property of a Hindu undivided family within section 73. On that question of fact there is evidence from the appellant's witnesses which puts him out of court, because it goes a long way to destroy the proposition that there can be any kind of family property in a Hindu undivided family except coparcenary property, which can also be called joint family property. The first submission is that the appellant should not be allowed to argue this section of the case on section 73 at all, because it is a question of fact with no evidence to support it. This is in truth family property, and it is wholly wrong to say that the owners are the coparceners and that therefore where there is only one coparcener it is the non-joint property of the family. [Reference was made to *Umayal Achi* v. *Lakshmi Achi*.[55]]

[Counsel was not required for the moment to deal with the Mysore bonds point.]

On the son's case there are three main points: (1) Does it pass under section 7? (2) Is it deemed to pass under section 8 (1) (*a*) because of competency to dispose? (3) Is it deemed to pass as an interest ceasing on his death? With regard to the section 7 point, in the light of the Board's ruling that no argument is open to the appellant about the whole property passing, this section 7 point is not open to him, and he is confined to the share which the son would have received on a partition, which goes to the question of competency to dispose. There is also on the section 7 point the question of concurrent findings of fact. Nothing was said in *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy*[56] about this particular kind of question of fact—foreign law. There are here concurrent findings in the son's case of two courts, for somewhat different reasons, but definite findings of fact on a matter of Indian law, which is fact, i.e., that this property within the meaning of Indian law did not pass on the death.

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[55] A.I.R. (1945) Fed.Ct. 25, 32.

[56] [1946] A.C. 508; 62 T.L.R. 549.

With regard to section 8 (1) (*a*)—" competent to dispose "—a number of English authorities was cited by the appellant: *Astor's* case [57] and *In re Parsons* [58] have no application, and *In re Penrose*,[59] so far as it goes, is adequately answered in the judgment of the Supreme Court.[60] Owing to the limited character of the power of a coparcener to dispose of joint property of a Hindu undivided family and the absence of any intention on the part of the son to separate himself in status from the undivided family, the property in question was not that of which he was at the time of his death " competent to dispose " within the meaning of section 8 (1) (*a*).

As to the cesser of interest point—section 8 (1) (*b*)—on which it would appear that the appellant's case can best be put, the whole of the respondents' argument is as stated in the Supreme Court judgment [61]: " The precise nature of an ' interest,' whose " cesser attracts estate duty if the second condition laid down " by section 8 (1) (*b*) is also fulfilled, can only be understood by " an examination of the connected section 17 (6). The deceased " or someone else must have enjoyed in respect of the property " *a beneficial interest capable of valuation in relation to the* " *income which the property yields*. In the present case, the " deceased did not enjoy during his lifetime an interest which " ' extended ' either to the whole or to a fractional part of the " income. . . . He merely had a right to be maintained by " the Karta out of the common fund to an extent which was at " the Karta's absolute discretion. . . . I find it impossible to " conceive of a basis of valuation which, in relation to such an " ' interest,' would conform to the scheme prescribed by section " 17 (6). Nor do I think that, upon a cesser of that so-called " ' interest,' a ' benefit ' of any value can be said to have accrued " to the surviving ' coparcener ' when the deceased's ' interest ' " lapsed."

Lastly, if the respondents are wrong on any one of those three points—passing, competency to dispose, cesser—it is submitted that they are not the proper people to be assessed, and are not liable. The respondents were not the administrators of the estate of the son, and were not in possession of and had not intermeddled

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[57] [1923] 2 K.B. 157.
[58] [1943] Ch. 12.
[59] [1933] Ch. 793.
[60] 55 C.N.L.R. 481, 495.
[61] Ibid. 493.

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with the son's property. [Reference was also made to *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya.*[62]]

Sir Frank Soskice Q.C. in reply. Except to the extent that the argument for the respondents asserts that it is the whole family which enjoys the coparcenary property, it does not appear that the appellant's 16 basic and fundamental propositions are challenged. It is submitted that the property was vested in and enjoyed by the coparceners subject to the obligation to maintain. The crucial proposition is that regarding the right to partition. As to the rights of the sole coparcener, *Dunderdale's* case [63] applies on what is the moment of passing; the fact that the property may change its character at a later stage is irrelevant. [Reference was made to *Dan Kuer* v. *Sarla Devi* [64] and *Income Tax Commissioner* v. *Bhagwati.*[65]] Cases which cover rights of execution creditors are *Sankaralinga* v. *Official Receiver of Tinnevelly,*[66] *Kalianna Goundan* v. *Masayappa Goundan,*[67] *Hanumantha Gowd* v. *Official Receiver, Bellary* [68] and *Rama Asra* v. *Official Receiver of South Kanara.*[69]

For 37 years it had been consistently accepted in the Indian courts that the sole surviving coparcener was a real and absolute owner of the property: *Sri Rajah Venkata Narasimha Appa Row's* case [70]; *Veeranna* v. *Sayamma.*[71] See also *Kalyanji Vithaldas* v. *Commissioner of Income Tax, Bengal.*[72] The reasoning in the earlier cases is not in any sense to be qualified by what was said in *Commissioner of Income Tax* v. *Dewan Bahadur Dewan Krishna Kishore,*[73] and that applies equally to *Anant Bhikappa Patil's* case [74]—the case which the appellant said was inconsistent with *Veeranna* v. *Sayamma.*[75] In *Anant Bhikappa Patil's* case [76] this Board itself described a sole coparcener as the sole owner. The position as to alienation by a sole surviving coparcener is as put in paragraph 257 of Mulla's Principles of Hindu Law; on the authorities he is looked at as the sole owner, and his alienations by gift or otherwise are not open to question. On the authority of *In re Northcliffe,*[77] assuming that there is a sufficient analogy between the English interests and those here, it is open to the appellant to say that half the property passed under section 7.

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[62] I.L.R. 25 Mad. 690, 717.
[63] 1935 S.C. 169.
[64] L.R. 73 I.A. 208.
[65] L.R. 74 I.A. 142.
[66] A.I.R. (1926) Mad. 72.
[67] A.I.R. (1943) Mad. 149.
[68] A.I.R. (1946) Mad. 503.
[69] (1947) 2 Mad.L.J. 509.
[70] I.L.R. 29 Mad. 437, 446.
[71] I.L.R. 52 Mad. 398.
[72] L.R. 64 I.A. 28.
[73] L.R. 68 I.A. 155.
[74] L.R. 70 I.A. 232.
[75] I.L.R. 52 Mad. 398.
[76] L.R. 70 I.A. 232.
[77] [1929] 1 Ch. 327.

Next, the son was "competent to dispose" because he could ask for partition, and the appellant is entitled to succeed on that except for the point that the son might not get any of the Ceylon property. As to cesser, the interest which ceases is that which consists of a right to call for a partition, and that is an interest which, within the meaning of section 17 (6), extends to the whole income of the half share. Upon that basis it is quite easy to value. The present assessees were persons who could be assessed under section 25 of the Ordinance of 1938. Lastly, the property in the hands of the father has the quality that it may become joint property, but it is not property which has the character of joint property within section 73. "Joint" must mean property which is jointly held, enjoyed or possessed. Section 73 is not applicable.

July 10. The judgment of their Lordships was delivered by VISCOUNT SIMONDS, who stated the facts set out above and continued: It was and is claimed by the appellant that estate duty in respect of the son's estate was exigible either under section 7 of the Ordinance (which corresponds with section 1 of the Finance Act, 1894) or under section 8 (1) (*a*) or (*b*) (which reproduce part of section 2 of the same Act).

It became necessary, therefore, to determine with as much precision as the subject-matter permitted, what was the nature of the son's interest in the property in Ceylon of the Hindu undivided family of which he and the father were coparceners. This was a question of fact for the courts of Ceylon and is today a question of fact for their Lordships also, notwithstanding that frequent reference was made to decisions of this Board given at a time when Hindu law was within their cognizance.

Expert evidence was accordingly called and given at great length by distinguished Hindu lawyers, who, though they necessarily agreed generally upon the material principles of the Mitakshara law, took different views upon certain aspects of that law. And it was upon those differences that counsel for the appellant based his argument, relying upon the evidence given by the Advocate-General for Madras before the District Judge. It was not seriously urged that this was a case in which their Lordships should regard the matter as concluded by the fact that there were concurrent findings by the District Judge and the Supreme Court as to the nature in Hindu law of the son's interest. They have therefore felt at liberty, and indeed bound, to scrutinize the evidence given by the witnesses together with the authoritative text books and the case law upon which they relied. Nor did they reject references in the present appeal to authorities which had not been referred to in evidence. But, having done so, they must express the opinion, which as the case proceeded more and more forced itself upon them, that the issue turned not upon the minor differences between the expert lawyers but upon the possibility, whichever of them was right, of bringing within the scope of a taxing Act couched in the language of the 1919 Ordinance an interest which originated in a wholly different system of law. The language of the Finance Act may be appropriate to the law of Ceylon, but it is singularly inappropriate to the legal concepts upon which the Hindu undivided family is based, and their Lordships would at the outset insist as a first principle of taxing law that its language is not to be strained to an unnatural use in order to enlarge its scope. This is particularly to be observed where the matter which is the subject of claim is well known and susceptible of clear definition and taxation by appropriate words.

It is in this context that the questions must be asked whether any property passed upon the death of the son within the meaning of section 7 of the Ordinance or whether, alternatively, he was " competent to dispose " of any property at the time of his death within section 8 (1) (*a*), or whether there was any property in which he had an interest ceasing on his death within section 8 (1) (*b*), an interest which falls to be measured by the extent to which a benefit accrues or arises by its cesser, which benefit is in its turn valued in accordance with the provisions of section 17 (6) of the Ordinance.

First, then, did any and what property " pass " on the death of the son? An attempt was made at the hearing before their Lordships to argue that the whole of the property in Ceylon of the Hindu undivided family so "passed," though a claim for estate duty in respect of one half only was made. Their Lordships considered this argument to be inadmissible in view of the assessment that had been made and the course that the proceedings had so far taken. Counsel was therefore limited to the argument that the son's share in that property "passed" and that that share was one-half.

It appears to their Lordships that this contention is refuted by the most elementary consideration of the Mitakshara law. The District Judge observed that " to describe the deceased as a " coparcener in relation to the joint property is but to adopt " a convenient term in the process of attempting to analyse a "legal concept which has no precise equivalent in this country." And he added, "the problem before us cannot satisfactorily be "solved by the mere selection of appropriate words." But, whatever else may be said of a coparcener, it is clear that it would be a misuse of language to say that he had a "half share" or any "share" of the family property. The numerous passages to which their Lordships were referred in Mulla's Principles of Hindu Law and Mayne's Hindu Law and Usage illustrate and expand the statement made by Lord Westbury in delivering the opinion of this Board in *Appovier* v. *Rama Subba Aiyan*[1]: "According to the true notion of an undivided family in Hindu "law, no individual member of that family, whilst it remains "undivided, can predicate of the joint and undivided property, "that he, that particular member, has a certain definite share." A little earlier in *Katama Natchier* v. *Rajah of Shivagunga*[2] Turner L.J. had referred to the property as "the common "property of a united family." "There is," he said, "com-"munity of interest and unity of possession between all the "('coparceners'), members of the family, and upon the death "of any one of them the others may well take by survivorship "that in which they had during the deceased's lifetime a common "interest and a common possession."

These two passages, capable as they may be of qualification and refinement, state the essential nature of a coparcener's interest. It is true that he has other rights which appear to enlarge that interest. He can separate from the family and ask for partition of the family property: he can in certain circumstances alienate his interest (a later and not universal development of the Mitakshara law) and, if he does so, the court will, if necessary, protect the alienee's right by decreeing the partition for which he might himself have asked. So also the court may intervene for the benefit of an execution creditor. These incidents give colour to the view that a coparcener has what may be called a "share." But against them may be set the fact that the disposition of the income of the family property is in the discretion of the Karta, usually the senior male member of the family, whose right and duty it is to maintain out of it not only the coparceners but also the female members of the family, the wives, widows and unmarried daughters of living or dead coparceners, and further to devote such money as may be necessary for such family purposes as the education, marriage, and religious ceremonies of the coparceners and of the members of their respective families (see Mulla, sec. 237). To say that in such circumstances a coparcener has a " share " of the property which " passes " on his death is in their Lordships' opinion a clear misuse of language. Nor does it help to say that the property is " vested " in or " owned " by (if " vest " and " own " are legitimate words to use) the coparceners for the time being rather than by all the members of the undivided family. It appears to their Lordships unnecessary to examine further this aspect of the claim, and the less so because they do not dissent from the views expressed by the District Judge and Gratiaen J. in their careful and exhaustive judgments.

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[1] (1866) 11 Moo.I.A. 75, 89.

[2] (1864) 9 Moo.I.A. 539, 611.

Section 7 failing him, the appellant turns to section 8 (1) (*a*) and contends that the son was at or immediately before his death " competent to dispose " of a share—again a half-share—of the Ceylon property of the undivided family: therefore the property passing on his death must be deemed to include that half share.

This contention was based primarily on the consideration that the son could at any time during his lifetime have obtained his share of the family property by partition. Having first communicated his intention to separate from the family, he could then have obtained his share either by agreement or in the absence of agreement by going to the court and getting a decree. It was a complementary contention that he could by alienating or purporting to alienate his " share " for value place his alienee in a position in which the court would decree in favour of the latter the same partition that it would have granted to him. Thus indirectly at one or two removes, it was said, one half of the Ceylon property could have been disposed of by the son in his lifetime. In support of this argument reference was made to English cases, such as *In re Penrose* [3] and *In re Parsons*.[4] The correctness of these decisions is not in issue, but it seems to their Lordships that they throw no light upon the question, though the argument illustrates the danger of trying to apply the principles of English law to the esoteric doctrines of the Hindu undivided family. There are other answers to the contention, but, leaving them aside for the moment, why should it be assumed that the son would take the necessary preliminary step of separating from his family, a step which for economic, sentimental and traditional reasons might be utterly repugnant to him? It would be little less than absurd to stretch "competency "to dispose" to such an extremity. Moreover, if, and so far as "competency to dispose" rests upon a right to obtain partition, it must be remembered that both son and father were domiciled in India and that the family property included interests not only in Ceylon but in India and other parts of Asia. Their Lordships have no right to assume in favour of the appellant that, if there had been a partition by agreement or decree, any part of the property in Ceylon would have fallen to the share of the son. Counsel for the appellant tried to meet this difficulty by saying that, if there was a partition, at least the Ceylon property would have fallen to someone's share, but this did not appear to their Lordships to be equivalent to saying that the son had been competent to dispose of it. The same considerations apply to the contention that the son was competent to dispose of one half of the Ceylon property because he might have alienated for value and his alienee might have applied to the court (to use a phrase sometimes used in this connexion) "to work out the equities" in his favour. Such a process leaves the son at a long distance from competency to dispose of any particular part of the family property.

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[3] [1933] Ch. 793; 49 T.L.R. 285.

[4] [1943] Ch. 12; 59 T.L.R. 19; [1942] 2 All E.R. 496.

Finally section 8 (1) (*b*) of the Ordinance was invoked. Duty is exigible under this subsection in respect of property (*a*) in which the son had an interest ceasing on his death, (*b*) to the extent to which a benefit accrues or arises by the cesser of such interest, the value of that benefit being measured in accordance with the provisions of section 17 (6) of the Ordinance, that is to say, if the interest extended to the whole income of that property, being the value of that property or, if it extended to less than the whole income of the property, being the corresponding proportion of the value of the property.

It is clear then that two elements must coincide. There must be not only a cesser of interest in property: there must be also a benefit arising by such cesser. And further, the benefit must be capable of valuation by reference to the income of the property which the deceased had enjoyed. The brief exposition already given of the law of the Hindu undivided family is sufficient to show how inept is the language of the Ordinance to embrace the case of the death of a coparcener. Their Lordships are so fully in agreement with what was said by Gratiaen J. in the Supreme Court that they quote and adopt his words[5]: "He [the deceased]

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[5] (1953) 55 C.N.L.R. 481, 493–494.

"merely had a right to be maintained by the karta out of the "common fund to an extent which was at the karta's absolute "discretion; in addition he could, if excluded entirely from the "benefits of joint enjoyment, have taken appropriate proceedings "against the karta to ensure a recognition of his future maintenance rights and also to obtain compensation for his earlier "exclusion. I find it impossible to conceive of a basis of valuation which, in relation to such an 'interest,' would conform "to the scheme prescribed by section 17 (6). Nor do I think "that, upon a cesser of that so-called 'interest,' a 'benefit' of "any value can be said to have accrued to the surviving "'coparcener' when the deceased's 'interest' lapsed." This reasoning appears to their Lordships to be cogent and conclusive. Counsel for the appellant sought a way of escape by urging that at least the surviving coparcener must benefit by the fact that the deceased could no longer claim partition of the family estate. That might or might not be an advantage to him, but the short answer is that it is not a benefit susceptible of valuation in the only way which the Ordinance prescribes.

In the result the claim to duty cannot be upheld either under section 7 or section 8 (1) (*a*) or (*b*). Subsidiary questions were raised with which it is not necessary to deal. If their Lordships had taken a different view on the main question, it would have been necessary to consider the local situation of certain so-called Mysore bonds. It need not now be discussed. Nor is it necessary to consider whether, as was urged by the respondents, they were not liable to pay the duty upon the son's death, even if it was otherwise exigible. Upon this question their Lordships express no opinion. Finally, a submission was made in regard to immovable property in Ceylon, in which reliance was placed on section 18 of the Partition Ordinance, No. 10 of 1863, and section 7 of the Wills Ordinance, No. 21 of 1844. This matter does not appear to have been raised in the court of the District Judge. In the Supreme Court it was dealt with summarily by Gratiaen J., and their Lordships concur in the view that he expressed.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant will pay the costs of the appeal.

Solicitors: *T. L. Wilson & Co.; Lee & Pembertons.*

C. C.

J. C.*

1957
July 10.

ATTORNEY-GENERAL OF CEYLON . . APPELLANT;

AND

AR. ARUNACHALAM CHETTIAR AND OTHERS RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Revenue—Estate duty—Hindu undivided family—Mitakshara—Death in 1938 *of sole surviving coparcener—Powers of adoption in widows exercised subsequently—Continuity of family preserved—Coparcener a member of Hindu undivided family at his death—Property in his hands "joint property of" the family—Statutory exemption from estate duty—Estate Duty Ordinance, No.* 1 *of* 1938, *s.* 73.

By section 73 (in its unamended form) of the Estate Duty Ordinance, 1938, of Ceylon: "Where a member of a Hindu undivided "family dies, no estate duty shall be payable on any property "proved to the satisfaction of the commissioner to be the joint "property of that Hindu undivided family."

The father, the sole surviving coparcener of a Hindu undivided family, to which also a number of females belonged, died in 1938, shortly after the Ordinance of 1938 came into operation. No other coparcener (after the death of his son in 1934) came into existence during his lifetime, but powers of adoption in his deceased son's widow and in his own widows were in fact exercised after his death. At all material times the female members of the family had the right of maintenance and other rights which belonged to them as such members. On a claim to estate duty in respect of the father's estate in Ceylon:—

Held, (1) that the father was at his death a member of a Hindu undivided family, the same undivided family of which his son, when alive, was a member, and of which the continuity was preserved after the father's death by the adoptions.

Pratapsing Shivsing v. *Agarsingji Raisingji* (1918) L.R. 46 I.A. 97 and *Anant Bhikappa Patil* v. *Shankar Ramchandra Patil* (1943) L.R. 70 I.A. 232 applied.

(2) That it was only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it could be determined whether the family property could properly be described as "joint property" of the undivided family. While it might be correct to describe the sole surviving coparcener as the "owner" of the family property, that which he "owned" was joint family property. His ownership was such that on the adoption of a son it assumed a different quality; it was such, too, that female members of the family had a right to maintenance out of it. The extent to which he could alienate it was an irrelevant consideration, for if he did not alienate it, it remained joint family property. The temporary reduction of the

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD COHEN, LORD SOMERVELL OF HARROW, and MR. L. M. D. DE SILVA.

coparcenary unit to a single individual did not convert what was previously joint property of the undivided family into the separate property of the surviving coparcener. Accordingly, while the undivided family persisted the property in the hands of a single coparcener could properly be described as the "joint property of" that family, and was therefore exempt from estate duty on, in this case, the death of the father, under section 73 of the Ordinance.

Judgment of the Supreme Court of Ceylon (1953) 55 C.N.L.R. 496 affirmed.

APPEAL (No. 17 of 1955) from a judgment and decree of the Supreme Court of Ceylon (October 12, 1953) reversing a judgment and order of the District Court of Colombo (November 8, 1949).

The facts are stated in the immediately preceding reported appeal, No. 16 of 1955, which was heard together with this appeal, and where the argument is reported.

The question in this appeal was whether the property assessed to estate duty as property passing on the death of Arunachalam senior (the father) was, on the evidence and the authorities, satisfactorily proved to be the joint property of a Hindu undivided family and, therefore, exempt from payment of duty under section 73 of the Estate Duty Ordinance, 1938.

Counsel and solicitors for the appellant and the respondents were the same as in the preceding appeal.

July 10. The judgment of their Lordships was delivered by VISCOUNT SIMONDS. Their Lordships have in their opinion in the preceding appeal, No. 16 of 1955, stated the facts which are relevant to this appeal also and made some references to the relevant law. They do not repeat them here.

The question which arises in this appeal is whether an assessment made by the Commissioner of Estate Duty under the Estate Duty Ordinance, No. 1 of 1938, in respect of the estate of one Rm. Ar. Ar. Rm. Arunachalam Chettiar can be upheld. This gentleman, who died on February 23, 1938, shortly after the 1938 Ordinance came into operation, was in the previous, and will in this, opinion be called the father. The District Judge upheld the assessment, but his decision was reversed by the Supreme Court of Ceylon (Gratiaen and Gunasekara JJ.). Hence this appeal by the Attorney-General of Ceylon.

The 1938 Ordinance introduced a new provision in regard to Hindu undivided families. By section 73 (in its unamended form) it provided as follows: "Where a member of a Hindu "undivided family dies, no estate duty shall be payable on any "property proved to the satisfaction of the commissioner to be "the joint property of that Hindu undivided family."

The father, as appears from the facts stated in the previous opinion, became upon the death of his son in 1934 the sole surviving coparcener of a Hindu undivided family to which also a number of females belonged. No other coparcener came into existence during his lifetime, but at all material times there subsisted a power of adoption in his son's widow, a member of the family, and after his own death a similar power in his widows. These powers were in fact exercised after his death as appears from the table which is incorporated in the previous opinion. Moreover, at all material times the female members of the family had the right of maintenance and other rights which belong to female members of a Hindu undivided family.

The question, then, is a narrow one of construction, whether (a) the father was at his death a member of a Hindu undivided family, and (b) the property of which he was the sole coparcener was the property of that Hindu undivided family. Upon (a) no doubt arises: it is conceded that he was a member of a Hindu undivided family. It must be observed that it was the same undivided family of which the son when alive was a member and of which the continuity was preserved after the father's death by the adoptions that have been mentioned. For his death did not put an end to the family line. Gratiaen J., in his judgment in the Supreme Court, quotes the language of this Board in two cases which appear to be apt to the present appeal. In *Pratapsing Shivsing* v. *Agarsingji Raisingji*[1] it was said: "Hindu lawyers do "not regard the male line to be extinct or a Hindu to have died "without male issue until the death of the widow renders the "continuation of the line by adoption impossible"; and in *Anant Bhikappa Patil* v. *Shankar Ramchandra Patil*[2] it was said: "a "Hindu family cannot be finally brought to an end while it is "possible in nature or law to add a male member to it." These and similar quotations which might be multiplied supply the context in which the second part of the question must be considered, viz., whether, while the undivided family thus persists, the property in the hands (to use a neutral expression) of a single coparcener can properly be described as the "joint property of" that family.

The nature of the interest of a single surviving coparcener was the subject of exhaustive evidence by expert witnesses and their Lordships were referred to and studied numerous authorities in which in reference to his interest language was used not incompatible with his being regarded as the "owner" of the family property. But though it may be correct to speak of him as the "owner," yet it is still correct to describe that which he owns as the joint family property. For his ownership is such that upon the adoption of a son it assumes a different quality: it is such, too, that female members of the family (whose numbers may increase) have a right to maintenance out of it and in some circumstances to a charge for maintenance upon it. And these are incidents which arise, notwithstanding his so-called ownership, just because the property has been and has not ceased to be joint family property. Once again their Lordships quote from the judgment of Gratiaen J.[3]: "To my "mind it would make a mockery of the undivided family system "if this temporary reduction of the coparcenary unit to a single "individual were to convert what was previously joint property "belonging to an undivided family into the separate property of "the surviving coparcener." To this it may be added that it would not appear reasonable to impart to the legislature the intention to discriminate, so long as the family itself subsists, between property in the hands of a single coparcener and that in the hands of two or more coparceners. It was urged that already the difference is there since a single coparcener can alienate the property in a manner not open to one of several coparceners. The extent to which he can alienate so as to bind a subsequently adopted son was a matter of much debate. But it appears to their Lordships to be an irrelevant consideration. Let it be assumed that his power of alienation is unassailable: that means no more than that he has in the circumstances the power to alienate joint family property. That is what it is until he alienates it, and, if he does not alienate it, that is what it remains. The fatal flaw in the argument of the appellant appeared to be that, having labelled the surviving coparcener "owner," he then attributed to his ownership such a congeries of rights that the property could no longer be called "joint family property." The family, a body fluctuating in numbers and comprised of male and female members, may equally well be said to be owners of the property, but owners whose ownership is qualified by the powers of the coparceners. There is in fact nothing to be gained by the use of the word "owner" in this connexion. It is only by analysing the nature

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[1] (1918) L.R. 46 I.A. 97, 107.

[2] (1943) L.R. 70 I.A. 232, 239.

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[3] (1953) 55 C.N.L.R. 496, 501.

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of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as "joint "property" of the undivided family. Judging by that test their Lordships have no doubt that the Supreme Court came to the right conclusion.

Had their Lordships taken a different view from that of the Supreme Court it might have been necessary to review some at least of the large number of cases cited at the Bar, from which chosen passages appeared to favour the contentions of the appellant. But, as was said in the case of the previous appeal, the matters upon which the parties and their expert witnesses were agreed were of far greater significance than those upon which they differed, and their Lordships doubt whether, even if the appellant's evidence stood alone, they could have come to any different conclusion as to the meaning and scope of the words "joint "property of that Hindu undivided family" as used in the 1938 Ordinance.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant will pay the costs of the appeal.

C. C.

[HOUSE OF LORDS.]

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Nov. 27, 28;
Dec. 20.

AUTOMATIC WOODTURNING CO. LTD. . Appellants;

AND

STRINGER . . . . Respondent.

Factory — Dangerous machinery — Fencing — Woodworking machine— Circular saw—Factory owners' duty—Fencing—Compliance with regulations—Whether further duty imposed by Act—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1)—*Woodworking Machinery Regulations,* 1922 (*S.R. & O.,* 1922, *No.* 1196), *reg.* 10 (*c*).

Court of Appeal—New trial, order for—Ground—R.S.C., Ord. 58, *r.* 5 (*Annual Practice,* 1956).

A girl employed in a factory cutting lengths of timber with a circular saw cut several lengths and was removing with a short stick some accumulated offcuts on the side of the bench when in

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* *Present*: Viscount Simonds, Lord Morton of Henryton, Lord Radcliffe, Lord Tucker and Lord Somervell of Harrow.

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some way which was unexplained her fingers came into contact with the revolving saw and were injured. It was admitted on her behalf that the saw had been fenced in accordance with the requirements of regulation 10 (*c*) of the Woodworking Machinery Regulations, 1922, but it was contended on her behalf that the factory owners were in breach of their common law duty to safeguard their employees. No evidence tendered on her behalf was excluded. In the course of the subsequent legal argument Oliver J. intimated his opinion that the factory owners were not guilty of negligence at common law, but suggested that it could be alleged that the saw was not fenced in accordance with section 14 of the Factories Act, 1937, and, the statement of claim having been formally amended, he so held. The Court of Appeal reversed his decision on this point, but ordered a new trial on the point of common law negligence. On appeal and cross-appeal to the House of Lords:—

Held, that on the assumption that there was no breach of the regulation, it could not be held that there had been a breach of the more general obligation under the section, since the obligation of the regulation, if duly complied with, was to be regarded as substituted for the more general obligation of the section. On the evidence the sweeping away of the offcuts was an essential part of this sawing operation and was not an ancillary operation to which compliance with the regulation had no relevance. Accordingly there was no room for the operation of the section.

Miller v. *William Boothman & Sons Ltd.* [1944] K.B. 337; 60 T.L.R. 218; [1944] 1 All E.R. 333 approved by the House of Lords in *John Summers & Sons Ltd.* v. *Frost* [1955] A.C. 740; [1955] 1 All E.R. 870 applied.

Benn v. *Kamm & Co. Ltd.* [1952] 2 Q.B. 127; [1952] 1 T.L.R. 873; [1952] 1 All E.R. 833 distinguished.

Held, further, that there was no reason which, in accordance with judicial precedent, would justify an order for a new trial. The issue of negligence was fully tried and all the evidence which counsel saw fit to call thereon was before the court.

Decision of the Court of Appeal [1956] 1 W.L.R. 138; [1956] 1 All E.R. 327 varied.

APPEAL AND CROSS-APPEAL from the Court of Appeal (Singleton, Jenkins and Hodson L.JJ.).

This was an appeal from an order of the Court of Appeal dated January 12, 1956, setting aside a judgment of Oliver J. dated June 20, 1955, in favour of the plaintiff (now the respondent) Jean Stringer, spinster and infant, suing by Thomas Stringer, her father and next friend, for the sum of £625 and costs, and ordering a new trial between the parties upon the issue of negligence under the common law. Her claim was for damages for personal injuries sustained on January 7, 1954, whilst working as a sawyer in the works of the defendants (now the appellants)

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Automatic Woodturning Co. Ltd., at Widnes, Lancashire. There was also a cross-appeal.

The facts, stated by Viscount Simonds, were as follows: The respondent, a girl then 18 years of age, met with an accident while working as a sawyer in the appellants' works at Widnes in Lancashire. It resulted in the partial amputation of two fingers of her right hand.

On July 22, 1954, she commenced this action against the appellants, in which she alleged that her injury was due to breaches of statutory duty or negligence on the part of the appellants. Particulars of this allegation were given, including the following: (1) the plea that the appellants failed to fence the circular saw at which she was working as required by regulation 10 (*c*) of the Woodworking Machinery Regulations, 1922, and (2) the plea that they failed to provide or maintain a safe system of work under which (*a*) the said circular saw would have been securely fenced and maintained, and (*b*) she would not have been required or permitted to remove surplus wood without stopping the circular saw or with inadequate instruments. Numerous other particulars were given, but they were abandoned in the course of the trial, as was the above-mentioned plea in regard to the Woodworking Machinery Regulations.

The power-driven circular saw at which the respondent was working had been properly set by a skilled man for cutting lengths of timber to make chair legs. As she operated the saw, there was left after each cut upon the table of the saw a piece of wood called an offcut. These offcuts accumulated on the side of the blade away from where the respondent stood to make the cuts. To remove them she was provided with a push-stick which she was instructed to use for that purpose. She was told to walk round to the far side of the blade before using it. She was told never to use her hands. She would, she said, have got into severe trouble if she had not used the push-stick. How the accident happened was not explained. In examination in chief she said: "I had the stick in my right hand, I just went to flick the offcuts "off the side of the bench and I felt a little prick on my hand, and "when I looked I saw the tips of my fingers lying on the bench." In cross-examination the following questions and answers were asked and given: "Q. How long was your push-stick approximately? A. About twelve inches. Q. Did you have the push-"stick in your right hand? A. Yes. Q. How did you get your "hand cut? A. I do not know. Q. Have you no idea at all? "A. No. Q. If you are using the push-stick, your hand should "not go anywhere near the saw, should it? A. No." The respondent was accepted by the trial judge, Oliver J., as an honest witness, and so, as I say, the accident was unexplained.

In the course of the trial, after the respondent's evidence, her counsel expressly abandoned all the allegations made on her behalf in these words: "In view of the answer which my client "has given, I feel that my case rests entirely upon the last part "of the case, that the system of allowing her to flick them like "that was wrong." He was referring to the system of removing the offcuts from the table of the circular saw with a push-stick. To the judge's question: "You do not trouble any more about "the Factories Act?" he answered "No." This took place after the conclusion of the respondent's case and there was no question of the exclusion of any evidence tendered on her behalf.

In these circumstances, the appellants called no other evidence than that of their foreman, who had had 35 years' experience in the sawmills business. He explained that the saw could be switched on and off with an electric button; that, when switched off, it ran for about half a minute and, while running down, it was still dangerous, that it was not the practice to stop the saw while removing the offcuts, that he had never seen it done in this or any other firm, and that assuming a push-stick was used it did not involve any danger.

The evidence being concluded, at some stage during the argument by counsel the judge intimated his opinion that the appellants had not been guilty of negligence at common law. He did not give a formal judgment at this stage, for in the meantime he had suggested that the respondent could allege that the circular saw was not fenced in accordance with the requirements of section 14 of the Factories Act, 1937. The statement of claim was formally amended so as to include this plea. The hearing having been adjourned, the judge on June 20, 1955, gave judgment which was directed almost entirely to the question of the applicability of section 14 of the Factories Act, 1937. He found that the appellants had committed a breach of this section but that the respondent had been guilty of contributory negligence to the extent of one-half, and gave judgment for the respondent for £650 and costs.

H. Nelson Q.C. and *J. M. Davies* for the appellant company. There was no material at all to enable the Court of Appeal to make an order for a new trial, and in so doing it departed from judicial precedent and established practice. Almost the only ground on which a new trial could have been ordered was that new evidence had come to light since the trial: see R.S.C., Ord. 58, rr. 4 and 5.[1] As to the principles to be applied, see *Shedden* v. *Patrick*[2] and *Nash* v. *Rochford Rural District Council*,[3] *per* Lord Cozens-Hardy M.R. and Scrutton L.J. Here at the conclusion of the evidence the judge intimated to counsel for the respondent that on the evidence presented to him he was unable to make any finding of negligence at common law against the appellant company. On the issues pleaded and abandoned by the respondent it was not suggested or shown that any fresh evidence was available which could not have been produced at the trial. It is important to decide cases in accordance with the pleadings before the court. At the trial the respondent failed to make out a case at common law and the judge found against her on this point. If the Court of Appeal thought he was wrong, it should have reversed his decision and not ordered a new trial.

J. M. Kennan for the respondent. The authorities cited for the appellant company are not in point. *Nash's* case[4] was decided under Ord. 58, r. 4, under which the admission of new evidence is very seldom allowed and which required substantial grounds before an order is made. But here the order of the Court of Appeal was made under Ord. 58, r. 5, which confers on the court an absolute discretion without any fetter.

There was substantial justification for the court's order, since the judge could not consistently have found the machine dangerous, as he did, without holding that there was common law negligence. In holding that there was no common law negligence he could not have applied his mind to the proper inferences from the facts which he found. Although it may be hard to frame precisely the reasons for sending the case back, the court was broadly right in the order which it made. This is submitted without prejudice to the submission that there was in fact evidence at the trial on which a breach of common law duty should have been found. If the House considers that the Court of Appeal's view as to the calling of fresh evidence was wrong, the respondent's counsel could still argue the case again at another hearing.

As to the statutory obligation, regulation 10 (*c*) of the Regulations of 1922 did not exhaustively define the duty of the appellant

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[1] Annual Practice, 1956, p. 1259. But Ord. 58 has since been radically amended.

[2] (1869) L.R. 1 Sc. & D. 470, 545, 547.

[3] [1917] 1 K.B. 384, 389–390, 393.

[4] [1917] 1 K.B. 354.

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company in relation to the saw. Where a regulation does not exhaustively define the duty of the occupier of a factory in relation to a particular part of a machine, he is not exonerated from complying with the Factories Act, nor does the regulation modify his duty thereunder in relation to that part of the machine which is not provided for by the regulation. Accordingly, the respondent should succeed under section 14 of the Factories Act, 1937. If that section had stood alone, there would clearly have been a breach of it here. Despite the regulations, there is a breach, because they only modified the obligation in relation to one side of the saw. They did not modify the obligation in regard to the particular operation on which the respondent was engaged, the sweeping away of the offcuts, which was an ancillary operation to which the regulations had no relevance. *Miller* v. *William Boothman & Sons Ltd.*,[5] which was approved in *John Summers & Sons Ltd.* v. *Frost*,[6] is distinguishable: see *per* Viscount Simonds in the latter case.[7] *Nicholls* v. *F. Austin (Leyton) Ltd.*[8] does not deal with the point. When regulations modify a statutory obligation, the question must be how far the modification goes. One must assume a minimum modification of a clear statute. From regulations 1, 10 and 11 it is clear that it is the operation of sawing which is being dealt with. The push-stick is a feeder. The regulations no doubt arose from good practice. Where, as here, one is dealing with a secondary activity different from the feeding, that is, the sweeping away of the offcuts, a different situation arises. *Benn* v. *Kamm & Co. Ltd.*[9] is relied on as indicating an exception to the modification rule. The subsidiary activity here places the saw in a different light and demands such an exception.

The appellants were also in breach of their common law obligation. Flicking the offcuts away was a dangerous operation which the respondent had to perform at intervals, and in so doing her only protection was that duty. A mere instruction that she should not flick pieces away with her hand was not sufficient. She was not fully instructed and supervised or provided with a suitable tool. No special precautions were taken to protect her. As to breaches of common law duty, see *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.*[10]

[5] [1944] K.B. 337; 60 T.L.R. 218; [1944] 1 All E.R. 333.

[6] [1955] A.C. 740; [1955] 1 All E.R. 870.

[7] [1955] A.C. 740, 752.

[8] [1946] A.C. 493; 69 T.L.R. 320; [1946] 2 All E.R. 92.

[9] [1952] 2 Q.B. 127; [1952] 1 T.L.R. 873; [1952] 1 All E.R. 833.

[10] [1956] A.C. 552; [1956] 1 All E.R. 386.

Their Lordships took time for consideration.

VISCOUNT SIMONDS, having stated the facts: My Lords, I have stated the course of the proceedings at some little length because I wish again to emphasize that the action took a normal course: no evidence was improperly admitted or excluded: the learned judge did not, it is true, give a reasoned judgment for rejecting the claim for negligence at common law, but it would be to do him much less than justice to suppose that he did not give it his full consideration. But, obviously sympathetic as he was to the respondent's case, he was of the opinion, which he shortly intimated, that upon this head it failed. There was clearly no sort of impropriety in such a course.

The appellants appealed to the Court of Appeal and before that court the respondent relied, as she was entitled to do, not only on the plea under section 14 of the Factories Act, 1937, but also on the plea of negligence at common law. The Court of Appeal, in my opinion, rightly allowed the appellants' appeal on section 14, but on the common law plea made an order "that a "new trial be had between the parties upon the issue of negli-"gence under common law only." From this part of their order the appellants have appealed to this House; from the former the respondent has cross-appealed.

My Lords, I will deal first with the appeal. This House is, I think, reluctant to interfere with the Court of Appeal in the exercise of its discretionary jurisdiction to order a new trial, but I have searched in vain for any reason which in accordance with judicial precedent would justify such an order in this case. Counsel for the respondent very frankly admitted that if he had been asked to frame any reasons to support an application for a new trial he would not have known how to do so. Nor does it seem that the court was asked to make such an order. All the evidence was before the court, and it was open to it to have taken a different view from that of Oliver J. and find for the respondent. That course the court did not (and, as I think, rightly) take. Why not? Let me quote Jenkins L.J.: "On "these questions [that is, the questions relating to negligence at "common law] the evidence as it stands provides no guidance: "and it is not for us to speculate what the result may be when "all these matters and the whole of the material relevant to the "issue of negligence are before the court." And I quote Hodson L.J.: "It may be that on a retrial evidence will be given on "one side or the other as to the practicability of various methods "which can be employed to protect the workman from danger." But, my Lords, this very question of negligence had been fully tried at the trial by the learned judge. All the evidence which counsel had thought fit to call upon that issue had been given. And let me here interpolate that the ability with which counsel for the respondent conducted her case in this House leaves me in no doubt that he showed good judgment as to the evidence that he decided to call. What then remains? If there had been an application to the Court of Appeal for leave to call fresh evidence (which there was not), it could only have been refused unless the practice consistently followed since *Shedden* v. *Patrick*[1] was disregarded. Yet, so far as I can follow the reasoning of the court, it was in order that the issue might be retried with fresh evidence that a new trial was ordered. I am driven to this conclusion, for it is not a tenable view that the court thought that the same issue should be tried again on the same evidence by the same or another judge.

The appeal should, therefore, in my opinion, be allowed with costs, and I turn to the cross-appeal. The respondent invites your Lordships to find in her favour on the issue of negligence at common law or on section 14 of the Act. On the former issue, which is one of fact, your Lordships are faced with the opinion of a judge very experienced in this branch of the law that the evidence did not support a plea of negligence and with the inability of the Court of Appeal upon that evidence to come to a contrary conclusion. I have reached the same conclusion and cannot usefully add anything upon this matter. Upon section 14 of the Factories Act, 1937, since the Court of Appeal have differed from Oliver J., I will say a few words. The question is whether, upon the assumption, which I must make, that the circular saw here in question satisfied regulation 10 (*c*) (the relevant regulation) of the Woodworking Machinery Regulations, 1922, the respondent can nevertheless succeed in her plea that there has been a breach by the appellants of their more general statutory obligation under section 14 of the Factories Act, 1937.

It was held in *Miller* v. *William Boothman & Sons Ltd.*,[2] which was recently approved by this House in *John Summers & Sons Ltd.* v. *Frost*,[3] that the obligation of a special regulation such as regulation 10 (*c*), if it has been duly complied with, is to be regarded as substituted for the more general obligation as to fencing contained in section 14 of the Factories Act, 1937. It was contended for the appellants and held by the Court of Appeal that the present case was governed by this authority. It had been, however, held by Oliver J. that he was enabled by two cases, *Benn* v. *Kamm & Co. Ltd.*[4] and *Dickson* v. *Flack*,[5] to distinguish the earlier case of *Miller* v. *William Boothman & Sons Ltd.*[6] and hold that the general obligation of section 14 of the Act had not in regard to the operation on which the respondent was engaged been superseded by the specific obligation in regulation 10 (*c*). "I find no difficulty," he said,[7] "in saying that "a saw may be correctly fenced for the purpose of operation as "a saw, but not correctly fenced for some other purpose." This view was expressed by counsel for the respondent by saying that the sweeping away of the offcuts was an ancillary activity to which compliance with the regulation had no relevance. I agree, however, with the unanimous opinion of the Court of Appeal that the cases of *Benn* v. *Kamm & Co. Ltd.*[8] and *Dickson* v. *Flack*[9] decide no more than that compliance with a special regulation in regard to the fencing of some specific dangerous part of a machine does not absolve the employer from taking proper steps under section 14 of the Act to fence some other part of the machine for which no provision is made in the special regulation. This is, I think, made particularly clear in the judgment of my noble and learned friend, Lord Somervell of Harrow, in *Benn* v. *Kamm & Co. Ltd.*[10] It is a different thing altogether to say, in regard to a single dangerous part of a machine which as a whole admittedly complies with the relevant regulation, that it does not comply with it for the purpose of what is called an ancillary activity. The evidence left me in no doubt that an essential part of the industrial operation of sawing lengths of timber with a circular saw was the sweeping of offcuts from the table of the saw. It is impossible that that should not have been foreseen when regulation 10 (*c*) was made in regard to circular saws and the admission, from which we cannot in this case depart, that the regulation was complied with, precludes us from holding that in regard to this activity there was any room for the operation of section 14.

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[1] (1869) L.R. 1 Sc. & D. 470.

[2] [1944] K.B. 337; 60 T.L.R. 218; [1944] 1 All E.R. 333.

[3] [1955] A.C. 740; [1955] 1 All E.R. 870.

The cross-appeal must, therefore, in my opinion, be dismissed with costs.

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[4] [1952] 2 Q.B. 127; [1952] 1 T.L.R. 873; [1952] 1 All E.R. 833.

[5] [1953] 2 Q.B. 464; [1953] 2 All E.R. 840.

[6] [1944] K.B. 337.

[7] [1955] 1 W.L.R. 971, 974.

[8] [1952] 2 Q.B. 127.

[9] [1953] 2 Q.B. 464.

[10] [1952] 2 Q.B. 127.

LORD MORTON OF HENRYTON. My Lords, the power of the Court of Appeal to order a new trial is set out in Ord. 58, r. 5, which is as follows: "If upon hearing of an appeal, it shall "appear to the Court of Appeal that a new trial ought to be had, "it shall be lawful for the said Court of Appeal, if it shall think "fit, to order that the verdict and judgment shall be set aside, "and that a new trial shall be had."

The matter is thus left to the discretion of the Court of Appeal, but the discretion must, of course, be exercised judicially, and I find myself in the same position as my noble and learned friend on the Woolsack; I can find no reason which could justify that court in ordering a new trial in the present case. I desire to add, however, that each member of the Court of Appeal appears to have been under a misapprehension as to the course of events at the hearing before Oliver J., and I think that the order for a new trial must have been based, to some extent at least, on this misapprehension.

I turn, first, to the judgment of Singleton L.J. He said: "There is no finding in regard to breach of duty at common "law," and later he observed: "I feel that if he had not been "satisfied that the plaintiff was entitled to succeed under "section 14 of the Act, the learned judge would probably have "considered the question of breach of common law duty in the "case of a girl of this type brought face to face with unnecessary "danger time and time again during the day. I do not think "that in such circumstances the employers were fulfilling the "duty which they owed to their workers. As I have said, there "is no finding upon that." In fact, however, the learned judge did consider the question of breach of common law duty and gave his opinion upon it on Friday, June 17, 1955, although that opinion was not repeated in the judgment which he delivered on Monday, June 20.

Counsel for the appellants stated, in paragraph 12 of their printed case presented in your Lordships' House: "At the con-"clusion of the evidence the learned judge intimated to counsel "for the respondent that on the evidence presented to him he "was unable to make any finding of negligence at common law "against the appellants." To the same effect is paragraph 12 of the respondent's case: "After hearing argument by counsel for "both parties (during which the learned judge intimated that he "was of the opinion that the appellants had not been guilty of "negligence under the common law) the learned judge adjourned

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"the hearing." Counsel on both sides repeated these statements at the hearing before this House.

Jenkins L.J. said, as to this issue[11]: "The judge never in "terms adjudicated upon it so far as one can tell from the "judgment." Hodson L.J. said[12]: "Although in the course of "speeches of counsel the judge made an observation which dis-"couraged the plaintiff's counsel from pursuing the argument "based on the common law claim, he never in his judgment "dealt expressly with this claim, having made up his mind that "he could find in favour of the plaintiff on another ground."

The course of the trial has been fully stated by my noble and learned friend on the Woolsack. I think it is clear that Oliver J. formed and expressed a clear opinion against the respondent on the question of breach of common law duty, and would have dismissed the action had it not occurred to him that the appellants might have been guilty of a breach of duty under section 14 of the Factories Act, 1937. No such breach of duty was alleged in the respondent's statement of claim, but the judge gave leave to the respondent to amend her statement of claim by alleging such a breach and gave judgment in her favour upon this point on Monday, June 20, 1955.

The Court of Appeal held unanimously that there had been no such breach. On this point I am of opinion, in agreement with the speech which has just been delivered, that the Court of Appeal was clearly right. The Court of Appeal then went on to deal with the question whether the respondent had proved any negligence at common law on the part of the appellants. Each member of the court appeared to think that more evidence might have been called at the hearing before Oliver J. Jenkins L.J. said: "The evidence as it stands provides no guidance." Hodson L.J. said: "It is not possible on the material before us to arrive "at a conclusion one way or the other." My Lords, the burden lay upon the respondent to prove negligence, and I read these observations as being equivalent to a finding by two members of the Court of Appeal (correctly, in my opinion), that the respondent had failed to discharge this burden by the evidence given at the trial. This being so, the action should have been dismissed, as the respondent had failed on all other points. Instead, the Court of Appeal ordered a new trial, although counsel for the respondent had called before Oliver J. all the evidence which he had desired to call, and had not invited the Court of Appeal to admit further evidence or to order a new trial.

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[11] [1956] 1 W.L.R. 138, 144; [1956] 1 All E.R. 327.

[12] [1956] 1 W.L.R. 138, 145.

My Lords, I cannot think that this order would have been made if the Court of Appeal had fully appreciated that Oliver J., after hearing all the evidence, had expressed his view that the appellants had not been guilty of negligence at common law. There is no indication in the record that the learned judge had not fully considered the evidence when he expressed this view.

In my opinion the appeal should be allowed and the cross-appeal dismissed, with the result that the respondent's action must also be dismissed.

Lord Radcliffe. My Lords, I agree.

Lord Tucker. My Lords, I concur.

Lord Somervell of Harrow. My Lords, I agree.

Appeal allowed; cross-appeal dismissed.

Solicitors: *J. W. Davies; Vizard, Oldham, Crowder & Cash for Linaker & Linaker, Runcorn.*

F. C.

[HOUSE OF LORDS.]

LISTER . . . . APPELLANT;

AND

ROMFORD ICE AND COLD STORAGE CO. LTD. . . . . RESPONDENTS.

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Nov. 5, 7, 8, 12, 13;
Dec. 20.

Master and Servant—Contract of service—Implied term—Injury to fellow servant by servant's negligent driving of lorry—Covered by employers' liability policy but not by motor policy—Damages and costs awarded against master—Whether implied contract by servant to indemnify master—Master's right to contribution or indemnity—Whether master under duty to insure servant against such risk—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *ss.* 35 (1), 36 (1) (*b*)—*Law Reform (Married Women and Tortfeasors) Act*, 1935 (25 & 26 *Geo.* 5, *c.* 30), *s.* 6 (1) (2).

Vicarious Liability—Indemnity for servant. Joint Tortfeasor—Contribution. Road Traffic—Third party insurance. Insurance—Subrogation. Contract—Implied term—Contract of service.

A lorry driver, employed by a company, took his father with him as mate. In backing the lorry he injured his father, who, in an action against the company, recovered damages in respect of the driver's negligent act. The company brought an action against the driver claiming that, as joint tortfeasor, it was entitled (1) to contribution from him under the provisions of section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, and (2) to damages for breach of an implied term in his contract of service that he would use reasonable skill and care in driving. To establish the quantum of damage it was proved that judgment had been given against the company in the first action and that it had paid or was liable to pay the amount of the judgment and costs:—

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* *Present:* Viscount Simonds, Lord Morton of Henryton, Lord Radcliffe, Lord Tucker and Lord Somervell of Harrow.

Held, that the driver was under a contractual obligation of care to his employers in the performance of his duty as a driver.

Held, further (*per* Viscount Simonds, Lord Morton of Henryton and Lord Tucker, Lord Radcliffe and Lord Somervell of Harrow dissenting), that the company was entitled to recover from the driver damages for breach of that contractual obligation and that there was no implied term in the contract of service that the driver was entitled to be indemnified by the company, his employer, either if the company was in fact insured or was required by the Road Traffic Act, 1930, to be insured, or if, as a reasonable and prudent person, it ought to have been insured.

Per Viscount Simonds and Lord Morton of Henryton. The company was also entitled to recover contribution from the driver under the Law Reform (Married Women and Tortfeasors) Act, 1935.

Per Lord Radcliffe and Lord Somervell of Harrow, dissenting. It is an implied term of such a contract of employment as this that the employer will see that the driver is protected by insurance from any third party liability arising from his driving and, accordingly, neither the employer nor his insurers can sue the driver in respect of that liability.

Decision of the Court of Appeal [1956] 2 Q.B. 180; [1955] 3 All E.R. 460 affirmed.

APPEAL from the Court of Appeal (Birkett and Romer L.JJ.; Denning L.J. dissenting).

This was an appeal from two judgments of the Court of Appeal dated October 26, 1955, and January 16, 1956. The court on the first date dismissed the appeal of the appellant, Martin Alfred Lister (the defendant in the action). On the second date the court ordered the appellant to pay the respondent company, Romford Ice and Cold Storage Co. Ltd. (the plaintiffs in the action) £100 in respect of its costs of appeal. Ormerod J. had ordered that judgment be entered for the respondent company "for £1,800 together with the plaintiffs' costs of defending the "action entitled *Lister* v. *Romford Ice and Cold Storage Co.* "*Ltd.*, 1951 L. No. 1409, such costs to be taxed as between

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"solicitor and client, with two-thirds of their costs herein." The action therein referred to had been brought against the respondent company by Martin Alfred Lister, senior (the father of the appellant), who had been awarded £1,600 damages. In the present action the respondent company claimed to be indemnified by the appellant in respect of this sum, of the costs payable to Lister senior (£200) and of their own costs of defending the action.

The facts, stated by Viscount Simonds, were as follows: The appellant was, in January, 1949, in the employment of the respondent company as a lorry driver. He was then some 27 years of age and had, apart from an interval during the war, been in that employment since he was 17. He had previously for a short time been employed by them as a general labourer. On January 28, 1949, accompanied as mate by his father, he drove his lorry into a slaughterhouse yard off the Old Church Road, Romford, to collect some waste. In the yard he backed his lorry and, in doing so, knocked down and injured Lister senior, who had previously alighted from it.

In June, 1951, Lister senior issued a writ against the respondents claiming damages for the personal injuries suffered by him, alleging that they were due to the negligent driving of the appellant and that the respondents as his employers were vicariously liable. This action was tried by McNair J. on January 29, 1953, and he held that the appellant had negligently driven the lorry in reverse without looking where he was going but that Lister senior was also at fault in failing to take proper care for his own safety, the relative responsibility being two-thirds for the appellant and one-third for Lister senior. The responsibility of the respondents was purely vicarious. The damage was assessed at £2,400 and judgment was entered for Lister senior for £1,600, two-thirds of that amount, and costs.

On January 26, 1953, three days before the trial of Lister senior's action, the respondents issued the writ in the action, in which this appeal is brought, claiming against the appellant "damages or in the alternative . . . payment by way of indemnity "or contribution in respect of such damages as may be adjudged "or agreed to be paid" to Lister senior in the first action and the respondents' costs of that action.

The proceedings were in fact brought in the name of the respondents, by an insurance company which ultimately paid the third party, under alleged rights of subrogation.

Harry Lester and *Denis Hart* for the appellant. The following are the appellant's submissions: (1) Whether any and, if so, what term is to be implied in the contract of service depends on the particular circumstances of the particular contract. (2) As between the appellant and the respondents, no term is to be implied in the particular circumstances of this particular contract that the servant will carry out his duties with reasonable care and skill. (3) On the contrary, in the circumstances of this particular case, there was an implied term (*a*) that the appellant should have the benefit of any insurance effected by the respondents covering any legal liability of the appellant to a third party in respect of matters arising out of his employment; (*b*) that the respondents' motor insurances would cover the appellant against any third party liability which he might personally incur arising out of his driving of the respondents' vehicles in the course of his employment; (*c*) that the appellant should not be required to drive a vehicle unless there was in force, in relation to his use thereof, a policy of insurance which provided him with the indemnity prescribed by section 36 of the Road Traffic Act, 1930. (4) If the appellant is not in breach of the implied term alleged by the respondents, the judgment of Ormerod J. cannot be sustained. (5) The intention of the legislature in giving, by the Law Reform (Married Women and Tortfeasors) Act, 1935, tortfeasors rights of contribution inter se was to give each tortfeasor an equal right of defence vis-à-vis the original plaintiff. A tortfeasor is in a position of equality only if he is made a party to the plaintiff's action, whether as defendant or third party, and, if he is not so joined, he cannot subsequently be sued under the Act by another tortfeasor.

The first submission is supported by *The Moorcock.*[1] As to the second submission, see *Harmer* v. *Cornelius.*[2] The only implied term is that a servant is competent to do his work. There is no implied term that he will never make a mistake. Even a skilful surgeon sometimes does so. As between, say, a chauffeur and the outside world, if he is negligent and injures someone, he is liable, and it matters not to the outside person how long he has been in his master's service or what is his record or what are his idiosyncrasies known to his master (e.g., old age or deafness). The master, knowing these defects, may be taken to have accepted them, but not the outside world. Towards his master the servant undertakes that he is competent, but he does

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[1] (1889) 14 P.D. 64; 5 T.L.R. 316.

[2] (1858) 5 C.B.N.S. 236, 246.

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not undertake to exercise reasonable skill, if every single act is to be taken as an exercise of that skill. The master takes the servant as a human being with all his faults. There is no undertaking that the servant will at all times not be negligent, since the master knows that at some time he is certain to fail to exercise reasonable care. Warrington L.J. in *Weld-Blundell* v. *Stephens*,[3] relied on by the respondents, went too far in stating the contractual duty. No question as to the duty and the extent of it arose in that case because that point had been conceded.

As to the third submission and the implied term referred to therein, see *Gregory* v. *Ford* [4] on the question whether the insurance has to cover the driver as well as the owner. Since the Road Traffic Act, 1930, it has been an implied term that the employer will take out and maintain a policy of insurance providing his servant with an indemnity. If the employer were covered but not the driver, then if the employer were successfully sued and recovered from the driver the sum awarded against him, the driver would have no indemnity at all. As to the application of the Law Reform (Married Women and Tortfeasors) Act, 1935, see *Jones* v. *Manchester Corporation*.[5] As to the implied term now contended for, *Semtex Ltd.* v. *Gladstone* [6] was wrongly decided. The servant is entitled to be insured against his liability to third parties and that is inconsistent with his being ultimately sued by his employer for damages in respect of the risk for which the cover was provided. As set out in paragraph 7 of the defence: " A. It was an implied term of the defendant's employ-" ment that he should not be required by the plaintiffs to do " anything unlawful and in particular that he should not be " required to drive unless there was in force in relation to the " use of the vehicle such a policy of insurance as would provide " him with the indemnity which section 36 (1) of the Road Traffic " Act, 1930, requires. The said term is to be implied by law. " B. Further it was an implied term of the defendant's employ-" ment that the plaintiffs' motor insurance should cover the " defendant against any third party liability which he might " personally incur arising out of the driving of the plaintiffs' " vehicle in the course of his employment." In considering an implied term one must go to the intentions of the parties at the time of the contract and consider what they would have said then. Implied terms may change with the times, and what would be implied in Victorian times might not be implied now and vice versa. An employer engaging a driver must be taken to know that an act of negligence may arise. As to the duty of the respondents to insure, see sections 35, 36 and 121 of the Act of 1930. See also *Tattersall* v. *Drysdale* [7]; *Sutch* v. *Burns* [8]; *Digby* v. *General Accident Fire and Life Assurance Corporation*,[9] and *Richards* v. *Cox*.[10] The appellant relies on paragraphs 4 and 5 of the defence. By paragraph 4: "It was an implied "term of the defendant's contract of employment with the "plaintiffs that the plaintiffs would indemnify him against all "claims or proceedings brought against him for any act done "by him in the course of his said employment . . ." By paragraph 5: "In the alternative it was an implied term of the said "contract that the defendant would receive the benefit of any "contract of insurance effected by the plaintiffs and covering "their liability in respect of the action above referred to. The "plaintiffs have effected such insurance and have been fully "indemnified and the defendant claims the benefit thereof." A question has been raised whether in relation to this particular accident the employers were under any obligation to hold a policy of insurance because this accident did not take place on a road. There is nothing in the relevant policy to limit its application to a road, but this point is left to the respondents to argue.

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[3] [1919] 1 K.B. 520, 536; 35 T.L.R. 245.

[4] [1951] 1 All E.R. 121.

[5] [1952] 2 Q.B. 852, 862; [1952] 1 T.L.R. 1589; [1952] 2 All E.R. 125.

[6] [1954] 1 W.L.R. 945; [1954] 2 All E.R. 206.

As to the Act of 1935, the only way in which a tortfeasor seeking to recover contribution from a joint tortfeasor can succeed is either to join him or to find him joined in the same action, because it is only in that action that the plaintiff's damage (here the father's) can be recovered. If a tortfeasor by a separate action seeks to recover contribution from an alleged joint tortfeasor, the damage in question cannot be the former plaintiff's damage. So when a tortfeasor (such as the respondent company here) sued in the first action has judgment recorded against him, in that matter alone did the plaintiff recover damages. Here in the second action, in which the respondents were plaintiffs and Lister junior defendant, the only damage claimed is not the former plaintiff's damage but that of the respondents. In fact the amounts are the same, but only if the joint tortfeasors were sued in the same action would they have a chance of disputing

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[7] [1935] 2 K.B. 174; 51 T.L.R. 105.

[8] (1943) 60 T.L.R. 1; [1943] 2 All E.R. 441.

[9] [1943] A.C. 121, 135–136; 58 T.L.R. 375; [1942] 2 All E.R. 519.

[10] [1943] K.B. 139; 59 T.L.R. 123; [1942] 2 All E.R. 624.

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the plaintiff's damage, questioning the quantum. The tortfeasor wishing to recover from a joint tortfeasor must prove the damage: see *Hollenden* v. *F. Hewthorne & Co. Ltd.*[11] It cannot be right that the son, not having been a party to the father's action, must accept without question the assessment of the damages. The fact of their relationship in this case is quite irrelevant. If it were possible for the respondents to have established again the amount of the damages in respect of which they were seeking to recover contribution, they should have done so in the second action, but they did not do so. The judgment for damages in the first action was inadmissible in evidence. The fundamental burden was on them as plaintiffs, since damages are always in issue. There might be a collusive action between an injured person, A, and a friend, B, one of the persons responsible for his injury, in which by a bargain or arrangement A recovered far more than he should have done by way of damages. Then if B sued C, an outsider and joint tortfeasor, in a separate action to recover contribution, it must be open to C to challenge the amount. Further, in the second action the writ was issued before the proceedings in the first action were completed. Accordingly, the claim should have been, not for damages or contribution, but for a declaration.

In any view, in the particular circumstances of this case, it would not be just or equitable to give the respondents a complete indemnity. In the case of a company, which can act only through its servants, the acts of the servant are the acts of the company, and the appellant's acts are the company's acts. He had been employed for many years without an accident and, in the ordinary experience of life, it was not reasonable to expect that he would not at some time or other for one reason or another be negligent and fall below the standard he would otherwise keep to. The appellant did not warrant that. Further, so far as he was aware, there was insurance cover for him. In this case the respondents alone should bear the burden.

As to the contractual obligations of the appellant to the respondents, the contract entered into was made when he was promoted from general labourer to lorry driver at the age of 17. In those circumstances, he did not put himself forward as possessing any skill. Skill is not to be equated with care, but care is relative and will depend on the employee's grade. If he is unskilled, the employer takes him for better or for worse with all his faults. If the appellant and the respondents had been asked by an officious bystander what they had agreed, they would have said that the respondents had no right of indemnity against the workman in respect of liability for his acts of negligence. So far as tort was concerned, the only duty which the appellant owed the respondents was the same duty that he owed to all the world, neither more nor less. His breach of duty vis-à-vis his father was also ipso facto a breach by the respondents. It could not form the basis of an action by them against the appellant for an alleged breach of duty to themselves. The appellant was not guilty of any breach of a common law duty to them. Further, the damages claimed by the respondents are too remote to be recoverable.

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[11] [1943] K.B. 587; 59 T.L.R. 321; [1943] 2 All E.R. 35.

Denis Hart following. In every case where a master has put his servant in charge of a dangerous machine, there ought to be implied, in the absence of express agreement to the contrary, a term in the contract of service that the master will indemnify the servant against any liability which the servant may incur as a result of the servant's management of the dangerous machine. It is the master who chooses deliberately, despite its dangerous propensities, to put the machine into operation for his own profit. The servant receives a wage which takes no account of any supposed personal responsibility on his part to compensate those (including his master) who may suffer as a result of a momentary act of negligence on his part in the management of the machine. A motor-vehicle is a dangerous machine within that general principle. Such a term, therefore, ought to be implied in this contract of service. With the advance of science, the capacity for destruction of such machines steadily increases. For a master to insure against liability incurred as a result of the mismanagement of such a machine is now a matter of course. The basis of the general principle is the presumed intention of the parties. No reasonable man would accept a job which continually exposed him to the risk of an enormous personal liability which might devour everything he had. No reasonable master would expect a man to accept a job on such a condition. When an employer owns a fleet of vehicles, it must be in everybody's mind that the drivers will be insured and the insurers will discharge any liability which they incur.

The Road Traffic Act imposes no obligation on the master to provide by insurance any indemnity for his servant. All he need do is to cover his own liability so far as the use of the vehicle on the road is concerned, whether he is driving it himself or using vicariously. The servant, therefore, when driving on his master's behalf may have, lawfully, no cover. In the event of an accident an injured person could sue the servant and recover from him. This supports the implication of a term in the contract of employment that the servant will be protected by an indemnity provided by the master; for, in the absence of such an implied term, the servant, even in the ordinary "Road Traffic Act" case, when the injured person is not a fellow servant and the incident occurs on a road, could not necessarily expect to have any insurance whatsoever. [*Lees* v. *Motor Insurers Bureau*[12] and *John T. Ellis Ltd.* v. *Hinds*[13] were referred to.]

Martin Jukes Q.C. and *Patrick O'Connor* for the respondent company. The duty of the servant to his master to take care has been recognized since 1406. See Bacon's Abridgement (1832), 5th ed., vol. V, p. 373, reproducing what was said in the first edition: "So if a servant that drives his master's cart, by his "negligence suffers the cattle to perish, an action upon the case "lies against him." The sidenote cites "7 Hen. 4, 14, and Bro. "tit. Action sur Case 54": see Brooke's Abridgement, 1573, vol. I, p. 5. The first reported case of a master suing his servant for damages because he had had to pay damages to a third party for the servant's negligence is *Savage* v. *Walthew*.[14] In *Green* v. *New River Co.*[15] it was said that a coachman can be sued by his master for negligence causing damage to a third party for which his master has to pay damages. See also *Harmer* v. *Cornelius*,[16] *Weld-Blundell* v. *Stephens*[17] and *Jones* v. *Manchester Corporation*.[18] *Semtex Ltd.* v. *Gladstone*[19] is on all fours with the present case and must be wrong if the appellant is right. As to the nature of the cause of action, the cases cited by Denning L.J. in the Court of Appeal[20] in the present case are to be distinguished. See also *Countess of Salop* v. *Crompton*[21] and *Jackson* v. *Mayfair Window Cleaning Co. Ltd.*[22]

The cause of action is not barred by the principle in *Merryweather* v. *Nixan*.[23] The respondents could have sustained an action in tort against the appellant even apart from the Act of

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[12] [1952] 2 T.L.R. 356; [1952] 2 All E.R. 511.

[13] [1947] K.B. 475; 63 T.L.R. 181; [1947] 1 All E.R. 337.

[14] (1707) 11 Mod. 135.

[15] (1792) 4 Term Rep. 589.

[16] 5 C.B.N.S. 236.

[17] [1919] 1 K.B. 520.

[18] [1952] 2 Q.B. 852.

[19] [1954] 1 W.L.R. 945.

[20] [1956] 2 Q.B. 180, 188–189; [1955] 3 All E.R. 460.

[21] (1599) Cro.Eliz. 777, 784.

[22] [1952] 1 T.L.R. 175; [1952] 1 All E.R. 215.

[23] (1799) 8 Term Rep. 188.

1935. See *Adamson* v. *Jervis*[24]; *Pearson* v. *Skelton*[25]; *Palmer* v. *Wick and Pultneytown Steam Shipping Co. Ltd.*[26] and *W. H. Smith & Son Ltd.* v. *Clinton and Harris.*[27] See also Salmond on Torts, 11th ed., p. 92, and the Third Interim Report of the Law Revision Committee, 1934, Cmd. 4637, for the background of the matter. *Ryan* v. *Fildes*[28] was rightly decided.

As to the question of damages, proof of the judgment in the first case and of the fact that the respondents have paid the damages awarded is prima facie evidence of the damage sustained by them, whether the cause of action be in contract or tort: see *Green* v. *New River Co.*[29] and *Yeomans* v. *Legh.*[30] It is conceivable that there might be cases where there might be collusion involved in the action against the master, but the defendant in the second action would be at liberty to establish that. The evidence of the judgment is the best evidence of the damage, because it is evidence of the damage in fact sustained, although it is not conclusive. The respondents pleaded in paragraphs 5 and 6 of their statement of claim the judgment in the first action and these paragraphs were admitted by the appellant. This was damage which directly flowed from the breach of contract. Even more plainly it flowed from the carelessness if the cause of action is in tort. The servant's duty both to his master and to all the world is to drive carefully. The damage is not too remote.

In summary so far: (1) The master has in law a good cause of action against his servant for damage caused by that servant to third parties as a result of which the master is vicariously liable to those third parties. (2) That cause of action is either in contract or in tort or both. (It does not matter which.) The trend of the authorities shows that there is a cause of action in contract. The damage caused to the master by having to pay the third party damages as a result of the servant's negligence is not too remote in contract or in tort. (3) The principle in *Merryweather* v. *Nixan*[31] does not bar the master's claim against his servant, and did not do so before the Act of 1935.

It is accepted that there was an implied term in the contract of service that the appellant should not be required to act illegally: *Gregory* v. *Ford.*[32] But the law does not require a policy to be in force which covers the employee driver himself:

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[24] (1827) 4 Bing. 66, 71.

[25] (1836) 1 M. & W. 504.

[26] [1894] A.C. 318, 324; 10 T.L.R. 511.

[27] (1908) 99 L.T. 840, 841; 25 T.L.R. 34.

[28] [1938] 3 All E.R. 517.

[29] 4 Term Rep. 589.

[30] (1837) 2 M. & W. 419.

[31] 8 Term Rep. 188.

[32] [1951] 1 All E.R. 121.

see *Richards* v. *Cox.*[33] This policy achieves what was required of it in law. If there was an implied term the appellant should precisely define it and state precisely when it was first imposed by the common law, whether on the advent of the first motor-car or of the first commercial motor-lorry, whether when third party insurance became so common as to be expected or only when it became compulsory.

But the alleged term was never heard of before this case. Where should the principle stop? Should it apply to a crane driver or a scaffolding erector, or an electrician or a fitter working on a machine? All these may carelessly injure third parties. Are they all to be absolved from their personal liability? Are they all to be entitled to assume that their employers, having covered themselves by insurance, will indemnify them, however great their negligence? Does this depend on the extent to which insurance against third party risks is known to prevail in any particular employment? Does the term depend on the fact that there are fewer cranes than cars and that the employer is less likely to drive his own crane? The object of insurance under the Road Traffic Act is the protection of the public and not of the employee: see *John T. Ellis Ltd.* v. *Hinds,*[34] *Lees* v. *Motor Insurers Bureau*[35] and *Marsh* v. *Moores.*[36]

Until the Act of 1935 there was no doubt of the master's right to indemnity or contribution enabling him to claim from his servant in respect of damages which he had had to pay as a result of the servant's negligence. This had been long accepted. Further, the appellant's argument is a departure from the doctrine of subrogation. To imply in the contract of service the term suggested by him would result in denying the insurer the right of subrogation given him either expressly by the policy of insurance or by implication of law. Such a term would be unenforceable unless agreed to by the employers' insurers: see *Mason* v. *Sainsbury.*[37] It is irrelevant to the right of the master to sue the servant for a breach of duty that the master is insured against its consequences. If the appellant were right the servant could be as negligent as he pleased and the master could not hold him liable but must indemnify him in respect of the consequences. That could be the result of such an implied term.

It is not right to try to modify the long accepted right of the master to sue his servant in this particular case and in this particular way, since it would give the servant a licence to be negligent and take away his sense of responsibility. The social consequences of implying the term suggested would be harmful. The servant should exercise proper care and skill in the performance of his duty. That is what the common law demands. The sanction which the law imposes should be maintained because of the grave consequences of any dereliction of duty. That sanction is that the servant is liable to his master in damages. It is not proper to create a sense of irresponsibility in a class of persons who owe the community constant vigilance.

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[33] [1943] K.B. 139, 143–144.

[34] [1947] K.B. 475.

[35] [1952] 2 T.L.R. 356.

[36] [1949] 2 K.B. 208; 65 T.L.R. 318; [1949] 2 All E.R. 27.

[37] (1782) 3 Doug. 61.

In summary, the general principle is that, in the absence of express agreement or statutory duty, the fact that one party to a contract or one party in an action for tort is insured, is not relevant. There is no departure from this principle in the special case of master and servant. If there were such a departure it might lead to much inconvenience in an action on insurance policies in the absence of one party to the policy. To imply such a term as is suggested would affect the rights of insurers without notice to them and without their agreement. Compulsory insurance under the Road Traffic Act does not affect the relationship of master and servant or add any term to the contract between them, save that the statutory requirement shall be complied with in the interests of the public. To imply such a term would have far-reaching consequences.

It is to be noted that there were in fact two policies of insurance in existence, an employers' liability policy and a motor-vehicle policy. It was in fact under the former that the insurers paid the third party, the other insurers making an ex gratia payment of about £200. Thus the question of the obligations under the Road Traffic Act did not enter into the matter. In any event, the accident, not being on a road, was outside the scope of the Act.

Patrick O'Connor following. To give effect to paragraph 4 of the defence, the implied term of the contract suggested would have to run as follows: "The master will indemnify the servant "in respect of any liability which the servant may incur in connexion with the driving of motor-vehicles by the servant in the "course of his employment by the master." But so as not to be so wide as to cover a penalty on a criminal conviction, that would have to be limited to operate "in respect of any civil "liability for accidental injury or damage." But to insert such a term into the contract of employment would give the driver a *carte blanche* insurance, whereas insurances are usually subject to many conditions; in the implied term sought to be imposed on the master all these are absent. That term is far wider than anything Parliament has sought to impose for the protection of innocent citizens and the court should not imply it. If it is to be in the contract, it must be express. To seek to imply in contracts of service an obligation wider and more onerous than the Acts demand is wrong. That would require legislation. Further, such cover would require an additional stipulation in policies of insurance under the Road Traffic Act.

It is a non sequitur to say that, because the insurer pays, the servant cannot be sued by the master. It is irrelevant to inquire whether or not there are reasons why the master may not enforce his rights against the insurer.

Harry Lester in reply. It is extraordinary that there is only one case (*Savage* v. *Walthew*[38]) in which a master has sued his servant, and there the facts indicate that the servant had been guilty of a tort vis-à-vis the master. The principle in *Merryweather* v. *Nixan*[39] applies here. A limited company of necessity can only act through agents, so that whatever knowledge is attributable to the agent must be attributed to the company which is identified with its agent.

Hollenden v. *F. Hewthorne & Co. Ltd.*[40] shows that a judgment against A should not be evidence against B. The appellant, if given the opportunity of hearing the evidence in the first action, would have controverted the amount of the damages. What was decided between other parties in a different court is not even prima facie evidence of the damage suffered by the respondents.

As to remoteness of damage, suppose a tyre manufacturer employs several men of greater or less skill and one of them works unskilfully so that a defective tyre is sent out and an accident results. If the injured person recovered damages from the master, the master could not sue the servant. That would be too remote.

It is an implied term of this contract of employment that if the respondents are covered by insurance and receive the benefit of it in respect of any accident arising out of the appellant's work as a lorry driver, they will not sue him. No principle is invoked which would have wider consequences than this case warrants. It is common knowledge that one must be insured against third party risks in the case of motor-vehicles. Such a term as this might be implied in one case but not in another; it depends on the particular circumstances of the particular contract. What would be implied now might well be different from what would have been implied 300 years ago, because the circumstances are different. One must take into account all the relevant circumstances which affect the minds of the parties.

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[38] 11 Mod. 135.

[39] 8 Term Rep. 186.

[40] [1943] K.B. 587, 589–590, 596.

The duty at common law to take reasonable care is entirely different from the contractual duty which a servant owes to his master. Vis-à-vis the whole world the standard is that of the reasonable man. Vis-à-vis the master the standard is that of the particular individual. The fundamental element in the relationship of master and servant is that the master takes the servant as a human being and therefore, within limits, must be taken to know that at some time or other the servant will fall from the standard imposed on him. The present contract did not necessitate an implied warranty of the exercise of any skill. If there were any warranty that the appellant would exercise any standard of care, it was that of an unskilled man who could drive a lorry. Such a servant is not responsible to his master for every act of negligence in the course of his driving. That would put him in the same position as the most highly skilled chauffeur. A breach of duty to the injured person is not necessarily a breach of duty to the servant's master.

Their Lordships took time for consideration.

Dec. 20. Viscount Simonds. My Lords, the facts in this case are not seriously in dispute, but they give rise to questions of considerable difficulty and importance.

[His Lordship stated the facts and continued:] On May 12, 1953, the respondents delivered their statement of claim in the present action. They pleaded the facts that I have stated, including the judgment which had by then been given; they alleged that they had paid the damages of £1,600 and were liable to pay the costs and that they had suffered loss and damage to the extent of such damages and costs by reason of the appellant's negligence. They pleaded further or alternatively that it was an implied term of the contract of service of the appellant that he would carry out his duties with reasonable care and skill and that he had failed to do so whereby they had suffered loss and damage. They claimed an order that they might be indemnified by the appellant in respect of the sums they had paid to Lister senior and their costs of defending the first action, and alternatively "damages for negligence and/or breach of contract."

I understand the first head of claim to be for a contribution of 100 per cent., that is, in effect, an indemnity under the Law Reform (Married Women and Tortfeasors) Act, 1935, which I will call "the 1935 Act," and the second head of claim to be founded alternatively on tort or the breach of a contractual duty of care.

The defence of the appellant, to which I must refer somewhat fully, put in issue the question of his negligence. It alleged that he was present in court throughout the trial of the first action and was ready to give evidence on behalf of the respondents but that they did not allow him to do so, and that the judgment against them was, therefore, not due to his negligent driving but to their failure to call him as a witness. I do not think that your Lordships will take this plea very seriously. It cannot by any means be sustained. Something more formidable follows, raising, I think, a question of general importance. For it was then pleaded that it was an implied term of the contract of service that the respondents would indemnify the appellant against all claims or proceedings brought against him for any act done by him in the course of his employment, and, in the alternative, that it was an implied term that he would receive the benefit of any contract of insurance effected by the respondents and covering their liability in respect of the first action, that the respondents had in fact effected such insurance and that he claimed the benefit thereof. And it was further pleaded that there was no such implied term of service as the respondents alleged, that he would carry out his duties with reasonable care and skill, but that on the contrary the respondents by engaging him to drive a lorry on their behalf impliedly accepted him with all such faults and failings as he might possess and without any right or claim against him in respect of negligent acts arising out of and in the course of his employment. It was in this state of the pleadings, though they were amended when the case was heard by the Court of Appeal, that the matter came before Ormerod J. for trial.

I will at once state the conclusions to which that learned judge came. After stating that the case had been put by counsel for the respondents (plaintiffs in the action) in two ways, first, that upon the ordinary law of contract the servant was liable to his master for damage suffered by him for the servant's breach of contract, it being an implied term of his contract that he would use reasonable care in the performance of his work, and, secondly, that he was as a joint tortfeasor entitled to contribution under section 6 (1) (*c*) of the Act of 1935, the learned judge said that he was constrained by the words of Denning L.J. in the case of *Jones* v. *Manchester Corporation* [1] to consider the case from the point of view of the Act of 1935. He found as a fact that the appellant had been guilty of negligence, rejected the contention that the claim for contribution could only be raised in the original action, and then proceeded to deal with what he regarded as the substantial defence, namely, that the contract of service was subject to the implied terms to which I have already referred. As to this he held, following the decision of Finnemore J. in *Semtex Ltd.* v. *Gladstone* [2] (a case, I will interpolate, which was, in my opinion, rightly decided) that, while it must be an implied term that the employer would not require the servant to do anything illegal and therefore would comply with the provisions of the Road Traffic Act, 1930, in respect of insurance, there was no evidence to support any further implication. He rejected also the plea that the writ was prematurely issued, and upon a consideration of the circumstances held that the respondents were, under the Act of 1935, entitled to a contribution which would amount to a complete indemnity. He gave judgment for the respondents accordingly.

There has, I think, been some confusion in the course of the case between two wholly separate torts, (*a*) the tort for which the appellant and, vicariously, the respondents might be made liable to Lister senior and in respect of which the respondents could claim contribution under the Act of 1935, and (*b*) the tort for which the appellant might be made liable to the respondents in respect of his breach of the common law duty of care. But I do not think that this now affects the issue, for, as I shall try to show, the deciding factor, whatever the cause of action, is whether or not certain terms are to be implied in the contract of service between the appellant and the respondents.

The appellant appealed to the Court of Appeal. At the outset of the hearing in that court the appellant took the preliminary point that the issue of the writ was premature, inasmuch as the liability of the respondents to Lister senior had not been established; this was said to follow from the decision of this House in *George Wimpey & Co. Ltd.* v. *British Overseas Airways Corporation*.[3] The respondents' answer was that at any rate it was not premature so far as it was founded on breach of contract whatever might be the position in regard to the claim to contribution under the Act of 1935. The Court of Appeal, in order that all the substantive matters in the appeal might be argued and decided, gave leave for a second action to be brought and consolidated with the first, the pleadings and evidence in the first action to stand as if they had taken place in the second action. This was duly done.

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[1] [1952] 2 Q.B. 852, 868; [1952] 1 T.L.R. 1589; [1952] 2 All E.R. 125.

[2] [1954] 1 W.L.R. 945; [1954] 2 All E.R. 206.

[3] [1955] A.C. 169; [1954] 3 All E.R. 661.

Before I state the result of the appeal it is necessary to note that the appellant was allowed to make substantial amendments of his defence and, as they formed the basis of much argument in this House, I will remind your Lordships that by paragraph 7 A it was pleaded that it was an implied term that the appellant should not be required to do anything unlawful and in particular should not be required to drive unless there was in force in relation to the use of the vehicle such a policy of insurance as would provide him with the indemnity required by section 36 (1) of the Road Traffic Act, 1930, and by paragraph 7 B that it was an implied term of the contract that the respondents' motor insurance should cover the appellant against any third party liability which he might personally incur arising out of his driving the respondents' vehicles in the course of his employment, and by paragraph 7 C that in breach of these implied terms or one of them the respondents required the appellant to drive a vehicle without there being in force in relation to his user thereof a policy which provided him with any indemnity either as required by the Road Traffic Act, 1930, or at all. The appellant was also allowed to amend his defence by adding a plea that the accident whereby Lister senior suffered damage was solely caused or contributed to by the negligence of the respondents. This plea had no substance whatever and I shall say nothing more of it.

In order to explain the appellant's defences which rested on the implied terms in regard to insurance and the Road Traffic Act, 1930, I refer to section 35 (1) of that Act, which provides that subject to the provisions of that part of the Act it shall not be lawful for any person to use or to cause or permit any other person to use a motor-vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of that part of the Act. Section 36 (1) states these requirements and, so far as material to this appeal, provides that such a policy must be a policy which insures such person or persons, or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road, but contains the proviso that such a policy shall not be required to cover liability in respect of the death arising out of and in the course of his employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment.

It appears that in fact the respondents had taken out just such a policy as the Act required excluding such death or injury as the proviso that I have read authorized it to exclude. The policy also provided that the indemnity given thereby should, subject to the provisions thereof, be extended to any person in the employ of the respondents driving the vehicle on their order and for their purposes. They had also taken out a policy insuring them against their liability as employers. This fact is relevant only because the policy contained a term authorizing the underwriters to "prosecute in the name of the assured for their own benefit any "claim for indemnity or damages or otherwise," and it has not been concealed that this action was brought by the underwriters in the name of the respondents, who, if it lay with them, would never have brought it. I say that this fact is not otherwise relevant because the action remains the action of the respondents and their rights are not greater or less than they would be if they were uninsured.

Upon the appeal being heard the court was divided, Denning L.J. being in favour of allowing the appeal and Birkett and Romer L.JJ. of dismissing it. It was accordingly dismissed.

It will be convenient to discuss first the question which divided the Court of Appeal, namely, what, if any, were the terms to be implied in the contract of service between the parties.

It is, in my opinion, clear that it was an implied term of the contract that the appellant would perform his duties with proper care. The proposition of law stated by Willes J. in *Harmer* v. *Cornelius*[4] has never been questioned: "When a skilled labourer," he said, "artizan, or artist is employed, there is on his part an "implied warranty that he is of skill reasonably competent to "the task he undertakes,—Spondes peritiam artis. Thus, if an "apothecary, a watch-maker, or an attorney be employed for "reward, they each impliedly undertake to possess and exercise "reasonable skill in their several arts. . . . An express promise

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[4] (1858) 5 C.B.N.S. 236, 246.

"or express representation in the particular case is not necessary." I see no ground for excluding from, and every ground for including in, this category a servant who is employed to drive a lorry which, driven without care, may become an engine of destruction and involve his master in very grave liability. Nor can I see any valid reason for saying that a distinction is to be made between possessing skill and exercising it. No such distinction is made in the cited case: on the contrary, "possess" and "exercise" are there conjoined. Of what advantage to the employer is his servant's undertaking that he possesses skill unless he undertakes also to use it? I have spoken of using skill rather than using care, for "skill" is the word used in the cited case, but this embraces care. For even in so-called unskilled operations an exercise of care is necessary to the proper performance of duty.

I have already said that it does not appear to me to make any difference to the determination of any substantive issue in this case whether the respondents' cause of action lay in tort or breach of contract. But, in deference to Denning L.J., I think it right to say that I concur in what I understand to be the unanimous opinion of your Lordships that the servant owes a contractual duty of care to his master, and that the breach of that duty founds an action for damages for breach of contract, and that this (apart from any defence) is such a case. It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract. Of this the negligence of a servant in performance of his duty is a clear example.

I conclude, then, the first stage of the argument by saying that the appellant was under a contractual obligation of care in the performance of his duty, that he committed a breach of it, that the respondents thereby suffered damage and they are entitled to recover that damage from him, unless it is shown either that the damage is too remote or that there is some other intervening factor which precludes the recovery. I should note in passing that it was urged on behalf of the appellant that the respondents had not proved the quantum of damage suffered by them by proving only that judgment had been given against them and that they had paid or were liable to pay the amount of the judgment and costs. This plea could not be sustained. It appears to me to be against reason and authority: see, for example, *Green* v. *New River Co.*[5]

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[5] (1792) 4 Term Rep. 589.

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What, then, is to deprive the respondents of their remedy? I do not think it can be said that the damages are too remote, for the injury to a third party and the ensuing liability of a master are events which the exercise of proper care is intended to avert. It is upon the implication of some implied term that the appellant must rely, and to this question I now turn.

My Lords, I cannot but be aware that any decision upon this question, which has divided learned judges in the courts below and upon which your Lordships are also divided in opinion, may have far-reaching consequences, and I have myself had great difficulty in reaching a conclusion.

I will refer first to the implied terms pleaded in the reamended defence, for at the end of the day the argument for the appellant was founded not upon them but upon the original pleas, or at least upon something very like them: the amended pleas can be shortly disposed of. As to paragraph 7 A, the valid answer was made, in general, that the appellant was not required by the respondents to do anything unlawful, and, in particular, that the Road Traffic Act, 1930, does not require that a policy of assurance shall be taken out which provides the driver of a vehicle with an indemnity against all the consequences of his own negligence. And as to paragraph 7 B, it was answered that a policy taken out by the respondents in fact covered the appellant against third party claims, but that it was not a third party claim that faced the appellant in this action. No more need be said of these pleas, except that the variety and multiplicity of the suggested terms were naturally contrasted with the general principle that an implication must be precise and obvious. I return, then, to the original pleas. These, I remind your Lordships, were contained in paragraphs 4 and 5 of the defence and were alternatives. Paragraph 4 pleaded an implied term that the respondents would indemnify the appellant against all claims and proceedings brought against him for any act done by him in the course of his employment. Were it not that at one time this term appeared to hold first place in the appellant's favour I should have thought that it might be summarily dismissed. It is all-embracing in its scope: whatever the degree of negligence, even of criminality, in his act: whether the respondents were covered by insurance or not, whether the act gave rise to a third party claim, which ought by law to be covered, or not; in every case the appellant would go free and the respondents bear the burden. I can neither accept an implication in such general terms nor put into the mouth of the pleader qualifications which might make the plea less unacceptable. It was in paragraph 5 that the implied term was pleaded which has appeared to me most worthy of consideration. It was that the appellant would receive the benefit of any contract of insurance effected by the respondents and covering their liability in respect of the action brought by Lister senior. It would, it was said, be inconsistent with this term if the respondents, having effected a policy and having been indemnified under it, then sought to recover damages from the appellant either for breach of his contractual duty of care or under the relevant provisions of the Act of 1935. This is the plea which found favour with Denning L.J., and the argument was put so simply and cogently by him that I venture to quote his judgment[6]: "Take this "very case," he says, "where the insurers issue a writ in the "employer's name against the servant without consulting either "the employer or the servant beforehand. When the servant "receives the writ he will take it to his employer and say 'Why "'are you suing me? Surely you have got the money from your "'insurance company. So you cannot sue me.' This natural "comment between master and man throws a flood of light on "the implied understanding of the parties." And a little later he says[6]: "This shows that there is an implied term in these "cases whereby, if the employer is insured, he will not seek to "recover contribution or indemnity from the servant."

It will be observed that the implied term which thus commended itself to the learned Lord Justice is limited in its scope. The driver is to be relieved from liability if his master is covered by insurance against the claim. If he is not covered, for instance, because the accident takes place not on a road but on private premises and the law does not require him to insure against such a risk, and he has not done so, then under this plea the driver must bear the consequences of his negligence if he is himself sued. This consideration led counsel to yet another variation of the plea. This was that the driver was entitled to be indemnified not only if the employer was in fact insured or was required by law to be insured, but also if he ought, as a reasonable and prudent man, to have been insured against the risk in question. It was in this final form, which approximates nearly to the plea in paragraph 4, that after much travail the implied term was submitted to your Lordships. No qualification of this general proposition was suggested. The driver might owe a duty of care to his employer, but for any dereliction from duty he was to be absolved from all responsibility. Nor was it suggested that in the present case there were any features which distinguished the relation of the appellant and the respondents from that of any other driver and his employer. That is why at the outset of this opinion I said that this appeal raises a question of general importance. For the real question becomes, not what terms can be implied in a contract between two individuals who are assumed to be making a bargain in regard to a particular transaction or course of business; we have to take a wider view, for we are concerned with a general question, which, if not correctly described as a question of status, yet can only be answered by considering the relation in which the drivers of motor-vehicles and their employers generally stand to each other. Just as the duty of care, rightly regarded as a contractual obligation, is imposed on the servant, or the duty not to disclose confidential information (see *Robb* v. *Green* [7]), or the duty not to betray secret processes (see *Amber Size and Chemical Co. Ltd.* v. *Menzel* [8]), just as the duty is imposed on the master not to require his servant to do any illegal act, just so the question must be asked and answered whether in the world in which we live today it is a necessary condition of the relation of master and man that the master should, to use a broad colloquialism, look after the whole matter of insurance. If I were to try to apply the familiar tests where the question is whether a term should be implied in a particular contract in order to give it what is called business efficacy, I should lose myself in the attempt to formulate it with the necessary precision. The necessarily vague evidence given by the parties and the fact that the action is brought without the assent of the employers shows at least ex post facto how they regarded the position. But this is not conclusive; for, as I have said, the solution of the problem does not rest on the implication of a term in a particular contract of service but upon more general considerations.

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[6] [1956] 2 Q.B. 180, 192; [1955] 3 All E.R. 460.

My Lords, undoubtedly there are formidable obstacles in the path of the appellant, and they were formidably presented by counsel for the respondents. First, it is urged that it must be irrelevant to the right of the master to sue his servant for breach of duty that the master is insured against its consequences: as a general proposition it has not, I think, been questioned for nearly 200 years that in determining the rights inter se of A and B the fact that one or other of them is insured is to be disregarded: see, for example, *Mason* v. *Sainsbury*.[9] And this general proposition, no doubt, applies if A is a master and B his man. But its application to a case or class of case must yield to an express or implied term to the contrary, and, as the question is whether that term should be implied, I am not constrained by an assertion of the general proposition to deny the possible exception. Yet I cannot wholly ignore a principle so widely applicable as that a man insures at his own expense for his own benefit and does not thereby suffer any derogation of his rights against another man.

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[7] [1895] 2 Q.B. 315; 11 T.L.R. 517.

[8] [1913] 2 Ch. 239; 29 T.L.R. 590.

Next—and here I recur to a difficulty already indicated—if it has become part of the common law of England that, as between the employer and the driver of a motor-vehicle, it is the duty of the former to look after the whole matter of insurance (an expression which I have used compendiously to describe the plea as finally submitted), must not that duty be more precisely defined? It may be answered that in other relationships duties are imposed by law which can only be stated in general terms. Partners owe a duty of faithfulness to each other; what that duty involves in any particular case can only be determined in the light of all its circumstances. Other examples in other branches of the law may occur to your Lordships where a general duty is presented and its scope falls to be determined partly by the general custom of the country which is the basis of the law and partly perhaps by equitable considerations. But even so, the determination must rest on evidence of the custom or on such broad equitable considerations as have from early times guided a court of equity.

In the area in which this appeal is brought there is no evidence to guide your Lordships. The single fact that since the Road Traffic Act of 1930 came into force a measure of insurance against third party risk is compulsory affords no ground for an assumption that an employer will take out a policy which covers more than the Act requires; for instance, a risk of injury to third parties not on the road but in private premises. There is in fact no assumption that can legitimately be made what policy will be taken out and what its terms and qualifications may be. I am unable to satisfy myself that with such a background there can be implied in the relationship of employer and driver any such terms as I have indicated. And though, as I have said, I feel the force of the argument as presented by Denning L.J., I must point out that at least in his view the indemnity of the driver was conditional on a policy which covered the risk having in fact been taken out. It may be that this was because his mind was directed to a case where such a policy was taken out and that he would have gone on to say that there was a further implication that the employer would take out a policy whether required by law to do so or not. But here we are in the realm of speculation. Is it certain that, if the imaginary driver had said to his employer: "Of course you will indemnify me against any damage that I "may do however gross my negligence may be," the employer would have said: "Yes, of course!"? For myself I cannot answer confidently that he would have said so or ought to have said so. It may well be that if such a discussion had taken place it might have ended in some agreement between them or in the driver not entering the service of that employer. That I do not know. But I do know that I am ever driven further from an assured certainty what is the term which the law imports into the contract of service between the employer and the driver of a motor-vehicle.

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[9] (1782) 3 Doug. 61.

Another argument was at this stage adduced which appeared to me to have some weight. For just as it was urged that a term could not be implied unless it could be defined with precision, so its existence was denied if it could not be shown when it came to birth. Here, it was said, was a duty alleged to arise out of the relation of master and servant in this special sphere of employment which was imposed by the common law. When, then, did it first arise? Not, surely, when the first country squire exchanged his carriage and horses for a motor-car or the first haulage contractor bought a motor-lorry. Was it when the practice of insurance against third party risk became so common that it was to be expected of the reasonable man or was it only when the Act of 1930 made compulsory and therefore universal what had previously been reasonable and usual?

Then, again, the familiar argument was heard asking where the line is to be drawn. The driver of a motor-car is not the only man in charge of an engine which, if carelessly used, may endanger and injure third parties. The man in charge of a crane was given as an example. If he, by his negligence, injures a third party who then makes his employer vicariously liable, is he entitled to assume that his employer has covered himself by insurance and will indemnify him however gross and reprehensible his negligence? And does this depend on the extent to which insurance against third party risks prevails and is known to prevail in any particular form of employment? Does it depend on the fact that there are fewer cranes than cars and that the master is less likely to drive a crane than a car?

It was contended, too, that a term should not be implied by law of which the social consequences would be harmful. The common law demands that the servant should exercise his proper skill and care in the performance of his duty: the graver the consequences of any dereliction, the more important it is that the sanction which the law imposes should be maintained. That sanction is that he should be liable in damages to his master: other sanctions there may be, dismissal perhaps and loss of character and difficulty of getting fresh employment, but an action for damages, whether for tort or for breach of contract, has, even if rarely used, for centuries been available to the master, and now to grant the servant immunity from such an action would tend to create a feeling of irresponsibility in a class of persons from whom, perhaps more than any other, constant vigilance is owed to the community. This was, I think, an aspect of the case which made a special appeal to Romer L.J. It cannot be disregarded.

Finally, it was urged that the implication of the suggested term in the contract between employer and driver would have the effect of denying to the insurer the right of subrogation given to him either expressly by the policy of insurance or by the implication of law. This would no doubt be the result. But I do not attach much importance to this. For if the implied term is imposed by law, not in respect of a particular contract but as a legal incident of this kind of contract, the insurer may be assumed to know it as well as anyone else. It may surprise him, but he should study the law.

My Lords, I have come to the conclusion that the considerations which I have discussed do not permit me to imply a term such as is pleaded in any of the alternative forms adopted in the original and amended defence or advanced in argument at the bar, and that the appeal so far as it is founded on an implied term in the contract of service must fail.

I do not find it necessary to discuss at any length the alternative claim under the Act of 1935. If under the first head of claim the respondents can recover damages for breach of contract, they can do no more. I will only say that I see no reason to doubt that under the Act, and probably apart from the Act (see *Pearson* v. *Skelton*[10] and *Adamson* v. *Jarvis*[11]), the respondents would be entitled to recover contribution from the appellant to the extent of 100 per cent. *Ryan* v. *Fildes*[12] was, I think, rightly decided. But, if the respondents cannot recover damages for breach of contract, they are, in my opinion, precluded from obtaining contribution from the appellant; if they claim under the Act, by its express language (see section 6 (1) (*b*)) and, if they claim apart from the Act, by the principles upon which the rule in *Merryweather* v. *Nixan*[13] has been consistently applied.

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[10] (1836) 1 M. & W. 504.

[11] (1827) 4 Bing. 66.

In the result, the appeal, in my opinion, cannot succeed and must be dismissed.

LORD MORTON OF HENRYTON. My Lords, I believe your Lordships are all of opinion that this appeal must fail unless the appellant can make good one or more of the special pleas set out in paragraphs 4, 5 and 7 A, B and C of the reamended defence, delivered as reamended on July 4, 1956. For this reason I shall deal briefly with the other issues in the action, though they are of considerable importance, and shall then turn to the pleas just mentioned.

The appellant injured his father and fellow-worker by reversing a motor lorry when his father was behind it. Ormerod J. found as a fact that the appellant "was negligent in the way in which "he reversed that motor lorry," and that this negligence "was "responsible for the injuries which his father suffered." That finding of fact clearly could not be successfully challenged in your Lordships' House, and, in my opinion, the appellant was under an implied contractual obligation to take reasonable care in driving the vehicle which he was employed to drive. I agree entirely with the views already expressed on this point by the noble and learned Lord on the Woolsack and by Birkett and Romer L.JJ. in the Court of Appeal. Prima facie, therefore, the appellant is liable in contract to pay to the respondents any damages which they have suffered as a result of his failing to take reasonable care on the occasion in question.

The next question which arises is, was there evidence before Ormerod J. establishing that the respondents had suffered damage, by reason of the negligent act of the appellant, to the amount of £1,600 and costs; that being the sum for which McNair J. gave judgment for the appellant's father in the action which he brought against the respondents. The respondents called evidence of negligence which satisfied Ormerod J., but they relied solely upon the judgment of McNair J. to establish the damage which they had suffered. Counsel for the appellant submitted that that judgment was not relevant evidence, in the present action, of the quantum of damage; the appellant was not a party to the action brought by his father, and the decision of McNair J. was in no way binding upon him. Counsel for the respondents pointed out that by paragraphs 5 and 6 of their statement of claim in the present action the respondents pleaded the judgment of McNair J. and the fact of payment of the damages awarded against them, and these paragraphs were admitted by the appellant. He did not contend that the judgment and payment were conclusive evidence as against the appellant of the quantum of damage suffered by the respondents; but he submitted that they were at least prima facie evidence, and no rebutting evidence was given by the appellant.

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[12] [1938] 3 All E.R. 517.

[13] (1799) 8 Term Rep. 186.

My Lords, I feel no doubt that this submission is correct, and it is supported by the observations of the court in *Green* v. *New River Co.*,[14] and of Parke B. in *Yeomans* v. *Legh.*[15] In the latter case the defendant was sued, in an action on the case, for negligent driving by his servant whereby the plaintiff suffered injury. The servant was called as a witness, and the question was whether he was a competent witness without a release. Parke B. said[16]: "I think the witness was competent without "a release. The effect of the clause in the statute [3 & 4 Will. 4, "c. 12, s. 26] is to make the witness competent, where the only "interest is that the verdict may be used for or against the "witness. In this case there is no interest, *except that the* "*verdict might be used against him in an action by his master,* "*to show the amount of the damages recovered.*"

It was further submitted by counsel for the appellant that the damages now claimed are too remote to be recoverable. My Lords, in my view there is no substance in this argument. The liability of the respondents to pay damages to the appellant's father arose directly out of the negligent act of the appellant which constituted the breach of his contract with the respondents.

If I am right so far, it is clear that, in the absence of the special pleas already mentioned, this appeal must fail, since the respondents would be entitled to receive, as damages for breach of contract, the sum awarded to them by Ormerod J. and the Court of Appeal. In considering these pleas I find it convenient to turn first to paragraphs 7 A, B and C of the reamended defence, which are as follows: "7 A. It was an implied term of "the defendant's employment that he should not be required "by the plaintiffs to do anything unlawful." So far, my Lords, I would agree—see *Gregory* v. *Ford*,[17] but the paragraph continues: "and in particular that he should not be required to "drive unless there was in force in relation to the use of the "vehicle such a policy of insurance as would provide him with "the indemnity which section 36 (1) of the Road Traffic Act, "1930, requires. The said term is to be implied by law." This part of the paragraph seems to be based on a misconception. The Road Traffic Act, 1930, does not compel the employer to provide an indemnity for the driver personally. See *John T. Ellis Ltd.* v. *Hinds* [18] and *Lees* v. *Motor Insurers Bureau.*[19]

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[14] 4 Term Rep. 589, 590.

[15] (1837) 2 M. & W. 419.

[16] 2 M. & W. 419, 421.

Paragraphs 7 B and 7 C are as follows: "B. Further it was "an implied term of the defendant's employment that the plain-"tiffs' motor insurance should cover the defendant against any "third party liability which he might personally incur arising "out of his driving the plaintiffs' vehicles in the course of his "employment. C. In breach of the aforesaid implied terms or of "one of them the plaintiffs required the defendant to drive the "said vehicle without there being in force in relation to his user "thereof any policy which provided him with any indemnity "either as required by the Road Traffic Act or at all." I need not consider whether or not paragraph 7 B is well-founded, for it does not appear that any third party has made any claim against the appellant. The only claim against him is the employer's claim in the present action.

I now come to the alleged implied terms set out in paragraphs 4 and 5 of the reamended defence, which are as follows:

"4. It was an implied term of the defendant's contract of "employment with the plaintiffs that the plaintiffs would "indemnify him against all claims or proceedings brought against "him for any act done by him in the course of his said employ-"ment. In the premises the plaintiffs are not entitled to bring "these proceedings against the defendant.

"5. In the alternative it was an implied term of the said "contract that the defendant would receive the benefit of any "contract of insurance effected by the plaintiffs and covering

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[17] [1951] 1 All E.R. 121.

[18] [1947] K.B. 475, 484; 63 T.L.R. 181; [1947] 1 All E.R. 337.

[19] [1952] 2 T.L.R. 356; [1952] 2 All E.R. 511.

"their liability in respect of the action above referred to. The "plaintiffs have effected such insurance and have been fully "indemnified and the defendant claims the benefit thereof."

Counsel for the appellant sought to find some justification for implying one or other of these terms in the particular circumstances of the appellant's employment with the respondents, but I can find nothing in these circumstances which should differentiate the appellant from any other young man who, having passed the necessary driving test, is employed to drive a motor lorry. I add that the appellant had been driving motor lorries for the respondents for about 10 years before the accident happened.

If any such term is to be implied in this case, it must surely be implied in all cases where an employee is employed to drive any kind of vehicle which might cause damage to third parties. And the implied term cannot be limited to cases where the vehicle is being driven on a public highway, for the accident in the present case occurred in a yard. Surely it must logically extend to cases such as a crane driver in factory premises, and many other cases come to mind which cannot logically be distinguished from the present case.

Such an obligation might have been imposed on the employer by statute, and it is perhaps of some significance that the legislature did not take this course when the law was so strikingly altered by the Road Traffic Act, 1930.

It cannot be said, in my view, that the implication of either of these terms is necessary in order to give "to the transaction "such efficacy as both parties must have intended that at all "events it should have" (*The Moorcock*[20]).

Turning now to another branch of the argument for the appellant, I cannot see that any events which have occurred in modern times, such as the passing of the Road Traffic Act, 1930, could justify your Lordships in holding it to be the law today that one or other of the implied terms now under discussion forms part of every contract whereby a man is employed to drive a vehicle. No provision of the Act of 1930 suggests to me that the terms to be implied in such a contract immediately after the Act became law should differ in any respect from the terms to be implied immediately before the Act became law. This matter is fully dealt with in the opinion about to be delivered by my noble and learned friend, Lord Tucker, which I have read, and I need only say that I entirely agree with his views upon it.

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[20] (1889) 14 P.D. 64, 68; 5 T.L.R. 316.

Counsel for the appellant finally suggested that some such term ought to be implied because in its absence the employee was placed in a most unfortunate position. It is, however, your Lordships' task to decide what the law is, not what it ought to be. In saying this I am far from suggesting that either of the terms now under discussion ought to be implied.

As to paragraph 4, the words "all claims or proceedings" would seem wide enough to cover, for instance, a fine imposed on the appellant under the Road Traffic Act, 1930; and the words "any act" would appear to cover reckless as well as careless acts. So read, this alleged term might well be void as being against public policy. I shall, however, assume in favour of the appellant that the term should be construed more narrowly, so as to read "would indemnify the appellant against any civil liability "for accidental injury or damage done by him in the course of "his said employment." Even so, it seems to me hardly consistent with the duty of a driver to take reasonable care in driving his employer's vehicle. That duty has been recognized in many cases, but no such implied term was ever suggested. As I have said, such a term is not necessary to give efficacy to the contract, and indeed it seems to me doubtful if an employer would agree to it. If so it cannot be implied.

My reasons for rejecting the implied term set out in paragraph 4 of the reamended defence apply also to the implied term set out in paragraph 5, with one exception; I do not think that the latter term, or any possible construction of it, could be held to be void as against public policy. It has, however, this somewhat surprising result—insurers who had paid the employer in a case of this kind would apparently be deprived of their right of subrogation by reason of an implied term in a contract to which they were not a party.

The result is, my Lords, that I am unable to accept any of the implied terms which have been pleaded, and I apprehend that no other implied term comes before your Lordships' House for consideration.

I feel, my Lords, that I ought not to end without making further reference to the judgment of Ormerod J. That learned judge felt himself bound by authority not to decide the respondents' claim for damages for breach of contract. His decision in favour of the respondents was given in the exercise of his discretion under section 6 (2) of the Law Reform (Married Women and Tortfeasors) Act, 1935. In the eyes of the law the respondents were joint tortfeasors with the appellant, since the appellant was their employee and his negligent act was done in the course of his employment. Ormerod J., therefore, had to consider whether the respondents ought to recover contribution from the appellant, and if so, what the amount of the contribution should be. After considering and rejecting submissions by counsel for the appellant that the contribution should be reduced by reason of certain defects in the lorry provided by the respondents, he said: "I am afraid here that the negligence was the "negligence of the defendant and in those circumstances he is "not entitled to anything by way of mitigation, and there must "be a contribution here for the full amount." The learned judge and I have thus arrived at the same result, although by a different route. I think it is only right to say that, in my opinion, this alternative route was open to the respondents in the present case, the reasoning of the learned judge was correct, and his exercise of his discretion was entirely proper.

I would add that there may have been yet another route by which the respondents might have achieved success. Counsel for the respondents submitted that his clients could have sustained an action in tort against the appellant, apart altogether from the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935, notwithstanding the well-known decision of Lord Kenyon C.J. in *Merryweather* v. *Nixan.*[21] He referred to *Adamson* v. *Jarvis*,[22] *Pearson* v. *Skelton*,[23] and *Palmer* v. *Wick and Pulteneytown Steam Shipping Co. Ltd.*,[24] and to observations of Lord Coleridge J. in *W. H. Smith & Son Ltd.* v. *Clinton and Harris.*[25] In the first of these cases Best C.J. said,[26] in regard to the rule laid down in *Merryweather* v. *Nixan*[27]: "from reason, justice, and sound policy, the rule that wrong-"doers cannot have redress or contribution against each other "is confined to cases where the person seeking redress must be "presumed to have known that he was doing an unlawful act"; and this saying was approved by Lord Herschell L.C. and other members of this House in the third of the cases just mentioned. Counsel for the respondents submitted that his clients, though joint tortfeasors with the appellant in the eyes of the law, were only liable vicariously for the wrongful act of their servant and were not debarred at common law from bringing an action for damages against him. My Lords, this is an interesting point, which may some day fall for decision by this House; but I express no opinion upon it, as it has not been considered in the courts below and I am of opinion that the respondents are entitled to succeed upon other grounds.

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[21] 8 Term Rep. 186.

[22] 4 Bing. 66.

[23] 1 M. & W. 504.

[24] [1894] A.C. 318; 10 T.L.R. 511.

[25] (1908) 99 L.T. 840, 841; 25 T.L.R. 34.

[26] 4 Bing. 66, 73.

[27] 8 Term Rep. 186.

I would dismiss the appeal.

LORD RADCLIFFE. My Lords, in my opinion the appeal ought to be allowed and an order made dismissing the respondents' action. Although the argument of the case necessarily travelled over a number of interesting points, there are only two issues which present themselves to be as essential to its decision. I confine myself to them accordingly. The first question is: did the appellant incur any and, if so, what liability to the respondents by virtue of the fact that, while acting as their employee, he drove their lorry negligently and thereby injured a third party? The second is: are the respondents entitled to enforce any such liability by legal action against the appellant, having regard to the circumstances of his employment and in particular the statutory scheme of compulsory insurance against third party risks which related to his employment?

On the first point I think it plain that the law does impute to an employee a duty to exercise reasonable care in his handling of his employer's property. It is the fact of such employment that places the property within his control; and if, as must be the case, he owes a general duty to all concerned not to be negligent in his exercise of that control, it would be a surprising anomaly that, merely because there was also a contractual relationship between himself and his employer, the standard of his obligation to his employer were to be somehow lower than the standard of his obligation to the outside world.

I cannot see any good reason why we should uphold the existence of such an anomaly. If the contract of employment is viewed as a general legal relationship in which the law imputes certain rights and responsibilities to each side, it would assign a very undignified position to the employee to suppose that the employer takes him "with all faults" and that the employee does not by virtue of his engagement impliedly undertake to use all reasonable care in the conduct of his employer's affairs. To say this is to say nothing new in the law. I am satisfied that from early times the law has consistently recognized the existence of this duty. I need not lengthen my opinion by reciting the authorities, some of which are noticed by others of your Lordships.

Nor does any different result appear if we attend to the circumstances of this particular employment. Certainly the appellant was a youth of 17 when he began to drive for the respondents. But he was required to take and did take his driving test before he took up the job, and there is nothing in the relationship which excludes an expectation of reasonable skill and care. Actually, I should regard the implications of his present employment as being determined by the circumstances in which he was re-employed after the end of the late war. He "came back as a "full time driver."

It was much canvassed in argument before your Lordships whether, if there was some such duty on the appellant, it was anything more than the general duty he owed the world to avoid the tort of negligence. On one view of the case this would indeed be a question of some importance in respect of costs. Since I take a different view as to the proper result of the case anyway, I do not need to dwell on this part of it. It is perhaps sufficient if I say that, in my view, this question is a somewhat artificial one. The existence of the duty arising out of the relationship between employer and employed was recognized by the law without the institution of an analytical inquiry whether the duty was in essence contractual or tortious. What mattered was that the duty was there. A duty may exist by contract, express or implied. Since, in any event, the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties, I should be inclined to say that there is no real distinction between the two possible sources of obligation. But it is certainly, I think, as much contractual as tortious. Since in modern times the relationship between master and servant, between employer and employed, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract. It is a familiar position in our law that the same wrongful act may be made the subject of an action either in contract or in tort at the election of the claimant, and, although the course chosen may produce certain incidental consequences which would not have followed had the other course been adopted, it is a mistake to regard the two kinds of liability as themselves necessarily exclusive of each other.

I have said this much out of respect to that part of the judgment of Denning L.J. in the Court of Appeal which deals with this topic. I do not agree with him that[28] "the action

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[28] [1956] 2 Q.B. 180, 188.

"against a servant must be founded on tort," and I do not think that his citation of authorities proves this point.

When I turn to the second issue with which I wish to deal, it seems unlikely that any decided authority will be of direct assistance. For the critical point is that we have to deal with an employment which it was illegal for the employer to authorize or for the employed to pursue unless insurance cover had been provided against third party liability. What are the necessary consequences of that legal requirement upon the respective rights and liabilities of employer and employed?

That there were some consequences has been common ground throughout this case. It is accepted that the law must impute a term to the effect that the employee could not be required to carry out any order that would involve him in doing something that was illegal, even though, but for the illegality, the thing required would have been within the normal scope of his duties. Put into non-theoretical language, that means that because of the Road Traffic Act, 1930, the appellant could not be employed to drive the respondents' lorry for them on the road unless there existed a policy of insurance complying with the conditions of the Act and so providing cover to indemnify any third party who might suffer actionable damage from the appellant's driving of the lorry.

Now, the insurance policy required could not come into existence of its own motion. One of the two parties, employer and employed, had to assume responsibility for taking it out or keeping it running and for paying up the necessary premiums to buy the cover. To which of them ought we to attribute that responsibility, having regard to the relationship of the parties? In my view, to the employer. I cannot suppose that, short of special stipulation, any other answer would be given in such a case. So far as it is relevant, all the evidence given at the trial, both by the appellant and by Colonel Howis, the respondents' managing director, confirms that this would be the right answer.

Is it, then, consistent with such an arrangement that, if the driver does cause third party damage by negligence and the person injured sues and recovers damages from the employer on the ground of his vicarious responsibility for the act of his servant, the employer should be able to recover over the damages that he has to pay by suing the driver? In my opinion, that is the simple question on which this appeal turns, but, of course, it is in practice impossible to keep it simple owing to the complications which emerge in any well-argued case. I will try briefly to notice some of them. It is not that I do not think that they involve difficulties, but the difficulties do not present themselves to me as being such as should affect the final result.

In the first place, I do not think that it matters whether the employer is really or only ostensibly the plaintiff. In this case we know, because no secret has been made of it, that the real plaintiff is one of the two insurance companies concerned. But the defendant's point, if it is a good one at all, is equally good whether it is his employer who is claiming against him or the insurers by subrogation. To each his reply is the same—" I and " my employer recognized that a fund of money had to be " secured by insurance to take care of any third party liability " that my driving might involve us in, and we arranged that he " should pay for and provide the insurance policy that would " produce the money. It follows from that that he cannot now " look to me to find all or part of that money." If that answer is a good reply to the employer, it is good against insurers who are subrogated to him. I do not at all understand the idea that it is somehow hard on the insurers that they should be affected by an implied term that bound the person to whose rights they are claiming to be subrogated.

Secondly, it is, I think, true that it would not have been illegal in the circumstances of this particular accident if there had been no insurance policy against third party liability. I assume, though we did not have any detailed argument about it, that the yard in which the accident took place was not a " road " within the meaning of the Road Traffic Act, 1930; and also that the Act does not make it compulsory to provide insurance against injury caused to another servant of the same employer. But if we take it, as, in my view, we must, that the existence of compulsory insurance under the Act involved that it was a term of the employment that the driving should be covered by a policy against third party liability, I do not think that the term postulated should be tied down to all the complications and qualifications which arise on a strict interpretation of the Act. What mattered to the parties was that, while the lorry was being driven on the employer's business, someone might be injured in circumstances that entitled him to recover damages from either employer or employee or both of them. From that point of view it did not signify whether the accident occurred on a road or in a yard that turned off it or whether the person injured was or was not in the employer's service. Any other view would leave it to the employee to take out his own policy to cover the residual risks, and this does not seem to me a reasonable arrangement to impute to the parties.

In fact, as we know, the employer provided insurance at his own expense by means of two separate policies, and these between them secured cover without excepting accidents off a road or injury to a fellow employee. Moreover, the motor-vehicle policy took what is certainly not the uncommon form of including a "third party extension," the effect of which was that the driver was equipped with his own direct right to call for indemnity from the insurers if he became liable to a third party for damages caused while driving the respondents' lorry.

I must call attention to this last point because it illustrates the almost intolerable anomalies which are involved in the respondents' argument. The situation is this. If an accident takes place through negligence, the person injured can sue either employer or employed or both of them. If he sues the employee alone, the latter calls on the insurance company for the cover which the employer has bought him; the insurance company has to provide the fund of damages required; neither the wages nor the savings of the employee can be touched to reimburse the insurers for the risk that they have underwritten. But if the injured person takes a different course, one which neither employer, employee nor insurance company can control, and sues the employer either alone or jointly with the employee, the position of the employee is, apparently, much worse and the position of the insurance company, apparently, much better. For now the latter can indemnify itself for the money it finds by getting it back from the employee in the employer's name and the former, instead of getting the benefit of the insurance which his employer was to provide, is, in the end, the one who foots the bill. I should be very much interested to know how the premium required by an insurance company is adjusted to the risk of these alternative situations.

My Lords, on this part of the case I take the same view as that taken by Denning L.J. I agree with what he says in his judgment in *Romford Ice and Cold Storage Co. Ltd.* v. *Lister*,[29] and I do not think it possible to escape the force of his reasoning. If we assume any understanding at all between the appellant and respondents as to insurance against third party liability, to the appellant's inquiry as to who was to provide it, the respondents must have answered: "We will see to that and the expense of

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[29] [1956] 2 Q.B. 180, 192.

"providing it will fall on us": but the result of this appeal depends upon which of the following alternatives they must be taken to have added. One would be to this effect—"but, of "course, you understand that although we are going to secure the "moneys required to pay the injured person in the first instance, "you will have to make them good ultimately, either to us or to "the insurance company." The other would be—"and, of "course, it is understood that, since we are providing for the "fund that will indemnify the injured person, that closes any "question of our calling upon you at any time to contribute to "that fund." I can only say that to me the first alternative seems a contradiction of what is involved in the respondents' undertaking to pay for and provide the fund. The second seems to be the natural exchange to take place between the company and their lorry driver.

I am, therefore, in favour of allowing the appeal. I think it a very difficult point and I well understand the difference of approach that leads us in this House to different conclusions. I ought, however, to say something about two considerations which have been advanced on behalf of the respondents but which are to me unpersuasive. It is said that to imply such a term as I propose is in effect to contradict the general duty of the employee to exercise reasonable care in carrying out his employer's work. I do not think that this is so. The general duty remains and it will have its legal effect on all acts of the employee which do not touch this question of insurance against third party liability. It is the special system whereby this form of insurance is a necessary condition of the employment which brings about the special result.

Then it is sought to show that the term in question cannot exist in law because it has never been heard of before this case. When did it first enter into the relations of employer and employed? Could it really have existed since the Road Traffic Act, 1930, if it did not exist before it? My Lords, I do not know because I do not think that I need to know. After all, we need not speak of the master's action against his servant for negligence as if it had been common fare at the law for centuries. Economic reasons alone would have made the action a rarity. If such actions are now to be the usual practice I think it neither too soon nor too late to examine afresh some of their implications in a society which has been almost revolutionized by the growth of all forms of insurance. No one really doubts that the common law is a body of law which develops in process of time in response to the developments of the society in which it rules. Its movement may not be perceptible at any distinct point of time, nor can we always say how it gets from one point to another; but I do not think that, for all that, we need abandon the conviction of Galileo that somehow, by some means, there is a movement that takes place.

LORD TUCKER. My Lords, I am of opinion that a servant employed to drive a vehicle in the course of his employment by his master owes a duty to his master to take reasonable care in the driving and management of the vehicle, that for breach of this duty an action founded on contract can be brought by the master against the servant, and that damages which have been awarded against the master by reason of the servant's negligence or breach of this duty are not too remote to be recoverable in the master's action against his servant claiming damages for breach of contract.

The reasons for reaching these conclusions, which are in accord with the views of the majority of the Court of Appeal, have already been stated. I agree with them and do not wish to add anything thereto.

I will accordingly confine myself to the question of the terms which the appellant contends should be implied in his contract of service which, if accepted, would have the result of relieving him from the financial consequences of his breach of his contractual duty in so far as such breach might result in injury to the person or goods of a third party when he was driving a motor-vehicle on his master's business.

My Lords, the terms which it is alleged are to be implied in this contract are to be found in the appellant's defence after amendment and reamendment. Throughout the hearing of this appeal counsel for the appellant has been content to adhere to the terms as pleaded and has not sought leave to make any further amendment notwithstanding various alternatives tentatively suggested by some of your Lordships during the hearing. In these circumstances I propose, and indeed I feel myself bound, to confine my observations to the implied terms which have been pleaded. They are as follows:—

Paragraph 4 of the defence: "It was an implied term of the "defendant's contract of employment with the plaintiffs that "the plaintiffs would indemnify him against all claims or pro-"ceedings brought against him for any act done by him in the "course of his said employment."

Paragraph 5: "In the alternative it was an implied term of "the said contract that the defendant would receive the benefit "of any contract of insurance effected by the plaintiffs and "covering their liability in respect of the action above referred "to. The plaintiffs have effected such insurance and have been "fully indemnified and the defendant claims the benefit thereof."

Paragraph 7.A: "It was an implied term of the defendant's "employment that he should not be required by the plaintiffs to "do anything unlawful and in particular that he should not be "required to drive unless there was in force in relation to the "use of the vehicle such a policy of insurance as would provide "him with the indemnity which section 36 (1) of the Road Traffic "Act, 1930, requires. The said term is to be implied by law."

Paragraph 7.B: "Further it was an implied term of the "defendant's employment that the plaintiffs' motor insurance "should cover the defendant against any third party liability "which he might personally incur arising out of his driving the "plaintiffs' vehicles in the course of his employment."

Apart from the difficulty on general principles, to which I shall refer later, of accepting any implied terms of this kind, those pleaded seem to me on their face to be open to serious objection. Paragraph 4 is far wider than anything which could reasonably be required on any view and would result in completely nullifying the effect of the duty of care which the servant owes to his master and give him licence to be as negligent as he liked.

Paragraph 5, to be effective, must purport to deprive the insurance company of their right on payment of the claim to be subrogated to the rights and remedies of their insured, which right exists independently of any express term in the contract of insurance. Alternatively, it may mean that the insured who has paid damages to the injured person out of his own pocket and received payment by way of indemnity from his insurance company must pay out of his own pocket the same sum to his servant to enable him to meet a claim brought against him by the insurance company by virtue of their right of subrogation.

Paragraph 7.A is based on the erroneous assumption that the Road Traffic Act, 1930, imposes an obligation on the employer to take out a policy which will cover the personal liability of the servant while driving in the course of his employment: cf. *John T. Ellis Ltd.* v. *Hinds*[30] and *Lees* v. *Motor Insurers Bureau*,[31] the correctness of which decisions has not been challenged.

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[30] [1947] K.B. 475, 484.

[31] [1952] 2 T.L.R. 356.

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Paragraph 7.B seeks to impose contractually a wider obligation than Parliament thought fit to impose when the Road Traffic Act, 1930, was passed.

But, my Lords, apart from these objections which make it impossible for me to accept any of the pleaded implied terms, the case raises questions of importance going beyond the precise language used in this case by the pleader.

Some contractual terms may be implied by general rules of law. These general rules, some of which are now statutory, for example, Sale of Goods Act, Bills of Exchange Act, etc., derive in the main from the common law by which they have become attached in the course of time to certain classes of contractual relationships, for example, landlord and tenant, innkeeper and guest, contracts of guarantee and contracts of personal service. Contrasted with such cases as these there are those in which from their particular circumstances it is necessary to imply a term to give efficacy to the contract and make it a workable agreement in such manner as the parties would clearly have done if they had applied their minds to the contingency which has arisen. These are the " officious bystander " type of case, to use Mackinnon L.J.'s well-known words. I do not think the present case really comes in that category, it seems to me to fall rather within the first class referred to above.

Without attempting an exhaustive enumeration of the duties imposed in this way upon a servant, I may mention: (1) the duty to give reasonable notice in the absence of custom or express agreement; (2) the duty to obey the lawful orders of the master; (3) the duty to be honest and diligent in the master's service; (4) the duty to take reasonable care of his master's property entrusted to him and generally in the performance of his duties; (5) to account to his master for any secret commission or remuneration received by him; (6) not to abuse his master's confidence in matters pertaining to his service: cf. *Robb* v. *Green.*[32]

It would, I think, require very compelling evidence of some general change in circumstances affecting master and servant to justify the court in introducing some quite novel term into their contract, for example, a term absolving the servant from certain of the consequences of a breach of his recognized duty to take care, or as to the provision of insurance covering the servant's liability to third parties or his master. I find it difficult to understand what, if any, are the limitations of this theory. Is it to be confined to the relationship of master and servant with reference to motor-cars, or is it to extend to all those employed in industry or transport who, in the very nature of things, are engaged on work in which negligence on their part may result in widespread and grievous damage amounting to thousands of pounds for which they may be liable to their employers and in respect of risks which it was customary for the employer to insure against long before the advent of the motor-car?

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[32] [1895] 2 Q.B. 1, 315; 11 T.L.R. 330, 517.

It is said that the passing of the Road Traffic Act, 1930, has created the new situation which gives rise to the necessity for these implied terms. It is common knowledge that for many years before 1930 the great majority of prudent motor-car owners protected themselves by insurance. Sections 35 and 36 of the Act were not passed for the protection of the bank balances of car owners, or the life savings of their employees, but simply and solely to ensure that persons injured by the negligent driving of motor-cars who established their claims in court might not be deprived of compensation by reason of the defendants' inability to satisfy their judgments.

Again, it is said that the passing of the Act has admittedly resulted in the introduction of one implied term, namely, that the servant shall not be required to drive a motor-vehicle the user of which has not been covered by insurance as required by the Act. This is merely the application of an existing term to the situation created by the Act. It has always been an implied term that the master will indemnify the servant from liability arising out of an unlawful enterprise upon which he has been required to embark without knowing that it was unlawful. When the Road Traffic Act required the user to be covered by insurance, a journey which would previously have been lawful became unlawful in the absence of the required cover. My Lords, I cannot accept the view that the impact of this Act on the previously existing obligation of the master is in any way comparable to the implied terms which it is now sought to introduce into the contract of service.

On the question of these alleged implied terms I find myself in complete agreement with Ormerod J. and Birkett and Romer L.JJ. I do not think there is any substance in the subsidiary matters relied upon by counsel for the appellant with regard to the claim not having been made by way of third party procedure or as to the inadmissibility in evidence in the present action of the judgment for damages in the suit by the injured man against the present respondents.

In the result I would dismiss the appeal.

LORD SOMERVELL OF HARROW. My Lords, the defendant, hereinafter called "the driver," was a lorry driver employed by the plaintiffs, hereinafter called "the employers." On January 28, 1949, the driver, while driving in the course of his employment, injured his father who was in the same employment. The father, whom I will call "the third party," claimed damages from the employers based on the alleged negligence of the driver. The claim succeeded though the third party was held also to have been negligent. Judgment was entered against the employers for £1,600 and costs. The employers in the present proceedings claim (1) an indemnity or contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935, (2) the £1,600 and costs as damages for breach (a) of an implied term of the contract of service that the driver would exercise reasonable care, (b) of a duty at common law to take care.

It is not now disputed the driver was negligent. As an answer to all or any of these claims the driver relied on an implied term that the employers would cover his, the driver's, liability to third parties and other damage by insurance, and that the present claim seeking to make him personally liable for the damages due to the third party was inconsistent with that term. There were other issues, some of which are not now maintained and some which do not arise on the view which I take.

Ormerod J. held in favour of the employers on the 1935 Act. This was affirmed by the Court of Appeal, Denning L.J. dissenting. He held that servants were not normally under a contractual duty to their masters to exercise reasonable care in the performance of their duties. That left a liability in tort. But for the Act of 1935 the employer could not as a joint tortfeasor claim indemnity or contribution. He can claim under that Act. Denning L.J. held, and I am summarizing, that, the employer being insured, there was an implied term that he would not seek to recover contribution or indemnity from the servant.

On the alleged contractual duty to carry out the duties of his employment with reasonable care, cases were cited to us which were not, I think, cited to the Court of Appeal. The earliest I need refer to is *Green* v. *New River Co.*[33] The plaintiff's house had been damaged by the bursting of one of the defendant's pipes. Lord Kenyon held that negligence must be proved. A witness was called who said that some hours before the burst he had drawn the attention of the defendant's turncock to oozing water, the suggestion being that the turncock was negligent in failing to attend to the matter. The defendant's counsel offered to call the turncock. The plaintiff objected to his giving evidence without a release. Lord Kenyon was of opinion that the turncock was an incompetent witness as he came to disprove his own negligence, which, if established by the verdict, would be the ground of an action against himself by his employers. The failure to attend to the matter would be, I think, a contractual and not a " tortious " failure.

In *Harmer* v. *Cornelius*[34] Willes J. said: " When a skilled " labourer, artizan, or artist is employed, there is on his part an " implied warranty that he is of skill reasonably competent to the " task he undertakes—Spondes peritiam artis. Thus, if an " apothecary, a watch-maker or an attorney be employed for " reward, they each impliedly undertake to possess *and exercise* " (my italics) " reasonable skill in their several arts."

It was suggested that in this passage Willes J. was laying down that a servant warranted only possession of skill and was not undertaking to exercise it with reasonable care. I think this is wrong. The learned judge is saying that the skilled labourer of the first sentence is under the same contractual obligation to his master as those mentioned in the sentence are to their customers or clients. The obligation to exercise reasonable care is assumed.

There is, however, no authority binding on your Lordships' House.

Most of the statements against too readily implying terms are in judgments in cases where one party is seeking to imply a term into a written and often detailed contract which is effective and covers the obligations of the parties in normal circumstances without the addition of the term sought to be implied. The position is different when the contract, written or oral, is silent as to matters which have to be settled one way or the other if the contract is to be effective. In the past, as today, goods are often sold, the parties dealing expressly only with the identification of the goods physically or by description and the price. The buyer claims that the goods are defective. The court has in such a case to imply terms. It would be doing so if it had allowed no exceptions to the warning caveat emptor. Sections 12 to 14 of the Sale of Goods Act, 1893, set out the terms which over the preceding years the courts had implied when the parties were themselves silent. Other examples of this process can be found in the terms to be implied in tenancies. A classic example of the process is Holt C.J.'s judgment in *Coggs* v. *Bernard*.[35]

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[33] 4 Term Rep. 589.

[34] 5 C.B.N.S. 236, 246.

It may be that in the case of sales of goods and tenancies the ground has been covered. I would not expect the ground to have been covered in the case of weekly wage earners who would seldom be worth suing. In any case, new circumstances may present new problems which have to be dealt with in the same way.

I think it is right to imply a duty on the part of the servant to take reasonable care in the carrying out of his duties. There would be a breach although there were no damage, and happily most acts of negligence do not cause damage. In the case of a chauffeur it would not, of course, be confined to driving, but would apply to the care of the car and other matters.

I therefore accept the submission on behalf of the employers that there is normally a contractual duty on a servant to take care. I now turn to the implication submitted on behalf of the driver as to the personal liability of the driver of a lorry or car for damage caused by negligent driving.

Soon after motor-cars came into use it became obvious that the risk of accidents due to negligence causing serious injuries and damage was very much greater than when vehicles were drawn by horses. Many years before 1930 no reasonable man allowed himself to be in a position where, if negligent, he would be liable to pay out of his own resources third party damages. He insured. Though this case is concerned only with third party liability it would, I think, be found that the normal policy also covered damage to himself and his car.

When a man is engaged as a chauffeur or a lorry driver the question whether his resources are at risk should he cause damage through his negligence is as important to him as it is to an owner

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[35] (1703) 2 Ld.Raym. 909.

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driver. Nothing was said in this case and I dare say nothing is usually said. If, when such a contract was being negotiated, the question had been raised, it is obvious, I think, that the driver would have stipulated for the usual cover that an owner driver provides for himself. If nothing is said it is, in my opinion, for the employer to see that the driver's resources are protected by insurance. It is inconsistent with such an obligation that the employer should seek by action to make the driver personally liable as in the present case.

I instanced during the argument the case of an owner who drives himself at times and at other times employs a chauffeur. "Unreasonable" would be too mild an epithet if the owner had protected his own resources if he was negligent but had failed to ensure the protection of his driver or, of course, made it clear to him that he must insure himself. If the present claim succeeds that would be the position.

I find it easier to imply this term than the obligation of the driver to take care. This term seems to me to be necessary for the efficacy of the contract. No driver would undertake the work if he was told his resources might be liable for damage caused by a negligent act or omission.

It is suggested that such a term would not be precise. It would, I think, be as precise as the "i" or the "f" in a c.i.f. contract. The policy tendered in a c.i.f. contract must be upon the "terms current in the trade": *Biddell Brothers* v. *E. Clemens Horst Co.*[36] If a policy is taken out in the ordinary terms that is sufficient.

I have not referred to the provisions of the Road Traffic Act, 1930, which makes third party insurance obligatory. This greatly strengthens the arguments for the term which I have implied, but I think myself the arguments would have been strong enough apart from that Act, which was directed to protecting the public.

I think the term which I have implied is covered by the pleadings.

I must say a word about *Digby* v. *General Accident Fire and Life Assurance Corporation.*[37] It was assumed in the earlier proceedings before du Parcq J. that the owner could bring an action against her driver for damages caused to the owner. The driver then claimed against the insurance company in respect of his liability to his owner. It is not, at any rate, clear that the owner was seeking to make the driver personally liable. It may have been that the driver was sued in order that the damages, if any, against him could be ascertained in order to test the liability of the insurers. In any event, the point does not appear to have been taken in the proceedings before du Parcq J. Lord Atkin says[38] that the proceedings against the driver were no doubt taken "with a view of eventual recovery from the insurance "company."

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[36] [1911] 1 K.B. 214, 220; 27 T.L.R. 47.

[37] [1943] A.C. 121; 58 T.L.R. 375; [1942] 2 All E.R. 319.

It is fair to the plaintiffs to state that these proceedings were brought in their name but without their knowledge or, I think, approval. They were brought by an insurance company, which ultimately paid the third party, under alleged rights of subrogation, contractual or in law.

It was suggested that the term which I have implied is unenforceable unless agreed to by the insurers of the employer. This point was not pleaded and I cannot think it is right. The insurer, when he has paid, succeeds to such rights as the assured possesses. The assured is not, as I see it, fettered in any way as to the terms on which he contracts with his driver.

A good deal of argument was based on the fact that there were two insurances, one being an employer's liability policy and the other a motor-vehicle policy. The former paid the third party, the latter making, I think, a payment said to be ex gratia of £200. There was a dispute, but this cannot throw any light on the contract between employer and driver.

It follows that, in my opinion, *Semtex Ltd.* v. *Gladstone*[39] was wrongly decided.

The implied term is an answer to the claim for damages and also to the claim for indemnity or contribution under the 1935 Act. Both claims seek to make the driver personally liable in respect of damages to a third party, which is plainly of the kind to be anticipated and covered.

It is said that this would have far-reaching consequences. So, I think, would the decision of the Court of Appeal. With respect. I think that decision is not only far-reaching but also anomalous. One may take as an example an accident causing damage which is within the compulsory provisions of the Road Traffic Act, 1930. If a driver was sued direct it seems clear the insurers would have to pay and there would be an end of it. If, however, the employer is sued the insurers again pay but can by subrogation recover

[38] [1943] A.C. 121, 138.

[39] [1954] 1 W.L.R. 945.

against the driver and levy execution on his savings. This would, I think, be anomalous. It would also mean that any driver who realized what the law was would have to take out a policy to cover this risk.

Romer L.J., at the end of his judgment,[40] said that it was not in the public interest that drivers should be immune from the financial consequences of their negligence. The public interest has for long tolerated owners being so immune, and it would, I think, be unreasonable if it was to discriminate against those who earned their living by driving. Both are subject to the sanction of the criminal law as to careless or dangerous driving. The driver has a further sanction in that accidents causing damage are likely to hinder his advancement.

The terms which I have implied might, I agree, apply to other cases. The question would be whether the damage sought to be recovered from the servant was damage which any reasonable person would cover by insurance. There would be the further question whether the employment was such that the servant, if nothing was said, was entitled to assume that the master would arrange the insurance. This is plain enough in car or lorry cases, as the owner has to have a policy under statute. In other cases it might be a question of evidence.

Other points were argued which do not arise on the view which I have formed.

I would allow the appeal.

Appeal dismissed.

Solicitors: *Sidney Torrance & Co.; J. F. Coules & Co.*

F. C.

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[40] [1956] 2 Q.B. 180, 213.

[HOUSE OF LORDS.]

H. L. (E.)* BOARD OF TRADE . . . . . APPELLANTS;

AND

OWEN AND ANOTHER . . . . . RESPONDENTS.

1956
Nov. 19, 20, 21, 22, 26.

1957
Jan. 29.

Criminal Law—Conspiracy, to commit acts—Conspiracy in England to defraud government department in Germany—Whether indictable offence in England.

Criminal Law — Fraud — Fraud on foreign government department — Intent to defraud.

The respondents were convicted on an indictment charging them with a conspiracy in London to defraud an export control department (known as Z.A.K.) of the Federal Republic of Germany by causing Z.A.K. to grant licences to export certain metals from Germany by fraudulently representing to Z.A.K. that the metals would be supplied to and consumed by Irish manufacturers, the respondents well knowing that they were in fact to be exported to Czechoslovakia, Poland, Rumania and the U.S.S.R. The conviction was quashed by the Court of Criminal Appeal. On appeal to the House of Lords:—

Held, that a conspiracy to commit a crime abroad is not indictable in England unless the contemplated crime is one for which an indictment would lie here, for conspiracy is recognized as an offence in order to prevent the commission of the substantive offence before it reaches even the stage of an attempt and this is all part and parcel of the preservation of the Queen's peace within the realm with which, generally speaking, the criminal law is alone concerned; and, accordingly, a conspiracy of the nature here charged (which was a conspiracy to attain a lawful object by unlawful means, rather than to commit a crime) is not triable here, since the unlawful means and the ultimate object were both outside the jurisdiction.

The matters alleged were correctly described as a conspiracy to defraud since a Government Department acts to its detriment if it issues a licence which enables something to be done which the Department is charged with a duty to prevent. Accordingly, there was disclosed a conspiracy which would be indictable here if the acts to be done and the object to be achieved were in this country.

Quaere whether a conspiracy in this country which is wholly to be carried out abroad may not be indictable here on proof that its performance would produce a public mischief in this country or injure a person here by causing him damage abroad.

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD RADCLIFFE, LORD TUCKER and LORD SOMERVELL OF HARROW.

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BOARD OF TRADE v. OWEN.

Reg. v. *Kohn* (1864) 4 F. & F. 68 and *Reg.* v. *Warburton* (1870) L.R. 1 C.C.R. 274 considered.

Decision of the Court of Criminal Appeal (sub nom. *Reg.* v. *Owen*) [1957] 1 Q.B. 174; [1956] 3 All E.R. 432 affirmed.

APPEAL from the Court of Criminal Appeal (Lord Goddard C.J., Ormerod and Ashworth JJ.).

This was an appeal by the Board of Trade from a decision of the Court of Criminal Appeal on October 2, 1956, allowing in part an appeal by the respondents, Henry Geoffrey Owen, company director, and Patrick Sidney Ernest Seth-Smith, chartered accountant, against convictions at the Central Criminal Court before Donovan J.

The facts, stated by Lord Tucker, were as follows: The respondents to this appeal, which was brought pursuant to the fiat of the Attorney-General, were convicted at the Central Criminal Court on May 17, 1956, after a trial before Donovan J. and a jury, on two counts of an indictment charging them with conspiracy; the respondent Owen was also convicted on a further count which charged him with uttering a forged document. They appealed to the Court of Criminal Appeal, who quashed the conviction on the first of the conspiracy counts and dismissed the appeals in respect of the other counts.

The counts referred to above were numbered 3, 5 and 6 in the indictment, and it was in respect of the order of the Court of Criminal Appeal quashing the conviction on count 3 that this appeal was brought by the Crown. It was now unnecessary to refer to counts 1, 2 and 4, two of which were quashed, while on the third no verdict was given.

Count 3, as amended at the trial, read as follows:—

"*Statement of Offence*

"Conspiracy to defraud.

"*Particulars of Offence*

"Henry Geoffrey Owen and Patrick Sidney Ernest Seth-"Smith between December 1, 1951, and December 1, 1953, in "the City of London and elsewhere conspired together and with "Austay London Ltd. and Alfred Robert Cummings and with "other persons unknown to defraud Gruppe Zentrale Ausfuhr-"kontrolle of the Bundesstelle Für den Warenverkehr der gewer-"blochen Wirtschaft of the Federal Republic of Germany "(known as and hereinafter referred to as 'Z.A.K.'), that is, to "cause Z.A.K. to grant licences to export certain metals from "the Republic of Germany by fraudulently representing to "Z.A.K. that the said metals would be supplied to and consumed by Irish manufacturers well knowing that such metals "were in fact to be exported to Czechoslovakia, Poland, "Rumania and the U.S.S.R."

Count 5:—

"*Statement of Offence*

"Conspiracy to utter forged documents.

"*Particulars of Offence*

"Henry Geoffrey Owen and Patrick Sidney Ernest Seth-"Smith and Leslie Eric Hamson between December 1, 1951, "and December 1, 1953, in the City of London and elsewhere "conspired together and with Austay London Ltd. and with "other persons unknown to utter forged documents purporting "to be end-user certificates made and given by the Secretary "of the Department of Industry and Commerce of the Republic "of Ireland on behalf of the Minister of the said Department "certifying that certain metals to be imported into the said "Republic would not be re-exported therefrom knowing the "same to be forged and with intent to defraud."

The general nature of the respondents' operations, as disclosed by the evidence, was summarized in the judgment of the Court of Criminal Appeal as follows [1]: "The conspiracy and the method "adopted to effect it can be quite shortly stated. The German "Government would not grant licences for the export of strategic "metals to Eastern European countries. The [respondents] "were directors of a company called Austay London Ltd. and "Seth-Smith was chairman of an Irish company called Smith "Miller (Eire) Ltd. Austay Ltd. bought metal in Germany and "the [respondents] put false documents before Z.A.K., the "licensing authority of the German Government, purporting to "show that the metal would be exported only to Ireland, whereas, "in fact, it was to be exported to 'Iron Curtain' countries. They "also obtained through Smith Miller (Eire) Ltd. and presented "to Z.A.K. documents which are known as end-user certificates, "which purported to be given by a Government Department of "Eire certifying that the metal would not be exported from but "would be used in Ireland. These documents, six of which "were proved in evidence, were bought for a substantial sum of

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[1] [1957] 1 Q.B. 174, 186–187; [1956] 3 All E.R. 432.

"money from a person who, apparently, carried on a business "in Dublin of supplying forged certificates."

Sir Reginald Manningham-Buller Q.C., A.-G., Neville Faulks and *David Hurst* for the Board of Trade. The questions are: (*a*) Can an indictment be presented in the United Kingdom for a fraudulent conspiracy, which would be triable here if the fraudulent acts were to be done here, when in fact the fraudulent acts were to be done outside the United Kingdom? (*b*) What is meant by the expression "intent to defraud"?

The crime of conspiracy is well established to consist of an agreement to do an unlawful act or a lawful act by unlawful means; the agreement itself constitutes the offence: see *Mulcahy* v. *Reg.*[2]

The company and the respondents evaded the Order of 1951 and by forged documents and false representations got lead, copper and steel behind the Iron Curtain. The question is whether by their conduct they have been guilty of a criminal offence triable here. It is undesirable that persons here should conspire to achieve ends which it is the object of the Order to prevent.

The third count in the indictment was the vital count. But Donovan J. was wrong in not requiring the jury to return a verdict on count 4 relating to a consignment of lead, alleged to be destined for Denmark, which was in fact exported to Czechoslovakia. Once the accused is in the charge of the jury, the judge has no power to discharge them from delivering a verdict: see *Rex* v. *Heyes.*[3]

The decision of the Court of Criminal Appeal amounts to a considerable restriction of the law relating to conspiracy. It is the making of the agreement that constitutes the offence, but if the court were right the general principle is made subject to a proviso that the offence of conspiracy is not committed if the unlawful end or the unlawful means to which the agreement is directed is to take place abroad. It is the agreement which constitutes the offence in this country, and in this case the agreement was made in this country. The court were wrong in directing their minds to the locality of the acts contemplated as opposed to the character of the agreement.

It is on the character of the agreement itself that depends the question whether or not the respondents are indictable here for conspiracy. They are indictable because it is clear that they intended by the agreement to obtain advantages by means of fraud and the use of forged documents. It does not matter whether the fraudulent acts were to be done within the United Kingdom or outside. Illegality appears on the face of this agreement and the offence was complete without anything being done. The law of conspiracy should not be cut down by considerations of locality, for the essence of the crime of conspiracy is the character of the agreement and not the locality of the acts to be performed.

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[2] (1868) L.R. 3 H.L. 306, 317.

[3] [1951] 1 K.B. 29, 30; [1950] 2 All E.R. 587.

If that proposition is too wide, then an agreement constitutes an indictable conspiracy when the acts done would be criminal if performed in this country and are criminal by the law of the country where they are to be done, or else if the acts contemplated would be a civil actionable wrong in the United Kingdom. Under the law of Western Germany, to obtain export licences by fraud is an offence, as is also to use forged certificates. It would be absurd if a conspiracy in this country to defraud Messrs. Cook's were indictable if the acts were to be done in London but not if they were to be done in Paris.

There is an accurate statement of what constitutes the criminal offence of conspiracy in *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch.*[4] *Reg.* v. *Newland*[5] is to similar effect. They are inconsistent with the view of the Court of Criminal Appeal in this case that a conspiracy is only indictable here if the acts when completed would themselves constitute an offence indictable here. See also *Reg.* v. *Aspinall*[6] and *Rex* v. *Whitaker.*[7] There is not any clear authority as to the law of conspiracy in relation to agreements to commit fraudulent acts abroad.

Reg. v. *Bernard*[8] does not help in this problem because it was a case, not of conspiracy but of incitement to commit a murder abroad; but *Reg.* v. *Tchorzewski*[9] supports the appellant's contentions. *Reg.* v. *Kohn*[10] is unsatisfactory as an authority, but it supports the appellant's submissions and not the conclusion of the Court of Criminal Appeal, because the judge's charge to the jury, properly construed, directed a conviction, even if the conspiracy was limited to scuttling the ship on the high seas, whereas, if he had been in agreement with the view of the Court of Criminal Appeal, one would have expected him to say somewhere that a conspiracy to scuttle a ship on the high seas was not indictable. That case does not support the conclusions drawn therefrom by the Court of Criminal Appeal. *Reg.* v. *Warburton*,[11] so far as it goes, supports the Crown's contentions. On the facts there was a conspiracy, to which the accused was a party, to defraud one Lister, the fraud being perpetrated in Saxony. If there had been any significance in the locality of the fraudulent conduct one would have expected some reference to be made to it in the Court of Criminal Appeal. See also Roscoe's Criminal Evidence, 16th ed., pp. 211–212, and 7th ed., p. 244; Stephen's History of the Criminal Law of England, vol. II, p. 13; Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 1481, and Wright's Law of Criminal Conspiracies and Agreements, p. 74. *Rex* v. *Brisac* [12] is really the converse case of the present one, since there several overt acts in London were proved. It indicates that a conspiracy may be tried in any place where an overt act in pursuance of it has been committed. It is really a case on venue. There is no limitation on the law relating to indictable conspiracy making it depend on the locality where the unlawful means are to be carried out to achieve the end. As to the question whether a conspiracy is indictable at least if the acts contemplated would be criminal here and in the country of commission, it is true that the judge at the trial here ruled out evidence of German law. Matters of foreign law in a criminal case are to be decided by the judge and not by the jury: *Rex* v. *Hammer*.[13] Since there was no evidence before the court as to the foreign law applicable, it may be that this proposition is not now open to the Crown. But the fraud was tortious in English law and, even in the absence of evidence, is to be presumed to be tortious also in German law: *Ertel Bieber & Co.* v. *Rio Tinto Co. Ltd.*[14] As to the onus of proving German law, it is to be assumed that the general law in Germany as to forgeries and frauds is the same as the law of England unless the contrary is proved. On the facts of this case, if Z.A.K. had suffered damage they could have sued the respondents here. Several authorities support the submission that a conspiracy to commit a civil wrong is indictable. Even if this proposition is not universally applicable, it must apply to those cases where the contemplated act is malum in se. The exact scope of the concept of malum in se is hard to define, but there is no doubt that forgery and fraud, the means employed in this case, come within it. An agreement in England to carry out a polygamous marriage in a country where such marriages were lawful would be indictable because here polygamy is regarded as malum in se. A wrongful act committed abroad is actionable here if it is also a tort under English law as well as in the country where it was done: see *Machado* v. *Fontes*.[15] An agreement to commit a civil wrong is indictable as a conspiracy, whether or not the contemplated victim of the wrong in fact suffers damage, so long as the agreement envisages an act which is likely to cause damage. It may be that Z.A.K. suffered no damage, but the wrong was complete in the conspiracy without any act. However, on the facts Z.A.K. did suffer damage, though it was slight, in the expense of employing persons to make out the licences obtained by the respondents. Further, they were induced to grant licences which they would never have granted if they had known the truth. As a Department of State they had the duty of dealing with applications for export licences and, as a result of the fraudulent misrepresentations, they granted licences, which were documents of value. This was a public mischief. While an agreement to do an act which is malum in se is indictable as a conspiracy, whether the act is to be done in the jurisdiction or outside it, an agreement to do an act which is merely malum prohibitum is not indictable when the act is to be done abroad: see *Reg.* v. *Martin*.[16] Agreements to do acts malum in se or contra bonos mores are indictable, though not either criminal or tortious: see Halsbury's Laws of England, 3rd ed., vol. X, p. 313, n. (*c*). Relevant United States authorities are *Dealy* v. *United States*[17] and *Hyde* v. *Shine*.[18] See also Corpus Juris Secundum, vol. XV, p. 1116, nn. 25 (3), 27, and vol. XXII, p. 273, n. 99, p. 274, n. 99 (7), p. 282, s. 185 j, p. 283, n. 71. It was argued for the respondents in the court below that the statutory provision made in respect of conspiracy to murder by section 4 of the Offences against the Person Act, 1861, shows that, apart from such provision, conspiracy is not indictable. But that is not so, and as to the significance of that section the Crown accepts the judgment of the court as correct.[19] The section did not alter the common law on the subject. As to what the common law is, there is no authority for the proposition that there cannot be an indictable conspiracy unless the act designed would be indictable in this country.

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[4] [1942] A.C. 435, 439; 58 T.L.R. 125; [1942] 1 All E.R. 142.

[5] [1954] 1 Q.B. 158; [1953] 2 All E.R. 1067.

[6] (1876) 2 Q.B.D. 48, 58.

[7] [1914] 3 K.B. 1283, 1299; 30 T.L.R. 627.

[8] (1858) 1 F. & F. 240.

[9] (1858) 8 St.Tr.N.S. 1091, 1095.

[10] (1864) 4 F. & F. 68.

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[11] (1870) L.R. 1 C.C.R. 274.

[12] (1803) 4 East 164.

[13] [1923] 2 K.B. 786; 39 T.L.R. 670.

[14] [1918] A.C. 260, 294–295; 34 T.L.R. 208.

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[15] [1897] 2 Q.B. 231; 13 T.L.R. 407.

[16] [1956] 2 Q.B. 272; [1956] 2 All E.R. 86.

[17] (1894) 152 U.S. 539, 546–547.

[18] (1905) 199 U.S. 62, 76.

As to the meaning of intent to defraud, this is distinct from an intent to deceive: see *In re London and Globe Finance Corporation Ltd.*,[20] referred to in the present case in the Court of Appeal.[21] It is clear that by the deceit Z.A.K. were induced to follow a course of action which, but for the false representations, they would not have followed, namely, to grant the export licences. They were induced to act to their own detriment and injury, because, although they suffered no pecuniary loss, they were induced to grant licences, which, if they had known the facts, it would have been their public duty and right to refuse. If there had been no intention to defraud in relation to Z.A.K., there could have been no intention to defraud in relation to the suppliers; the two cases are indistinguishable. In relation to Z.A.K. there was an intention to defraud. Reliance is placed on *Rex* v. *Bassey*,[22] which was followed in *Reg.* v. *Newland.*[23] See also *Rex* v. *Brailsford.*[24]

In summary, on the facts there was clearly an indictable conspiracy, because its character involved fraud and forgery. The indictability did not depend on the locality where it was intended to use the forged documents. If either the means or the end are criminal, that is enough, irrespective of whether they are to be used in this country. The object was to obtain an export licence, and there is nothing unlawful in that per se, but the means were fraudulent and were designed to defraud Z.A.K. of an export licence by fraudulent misrepresentations. If it can be put no higher, an agreement to commit an act which would be criminal if committed here, and is also criminal under the law of the country where it is committed, is indictable. Even if what was contemplated here was not criminal, it was tortious, and the agreement is indictable on that ground. Z.A.K. acted to their detriment and the German State suffered injury. That would be enough to found an action for tort here. It is enough if the act was likely to cause damage.

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[19] [1957] 2 Q.B. 174, 188; [1956] 3 All E.R. 342.

[20] [1903] 1 Ch. 728, 732–733; 19 T.L.R. 364.

[21] [1957] 2 Q.B. 174, 187.

[22] (1931) 47 T.L.R. 222; 22 Cr. App.R. 160.

[23] [1954] 1 Q.B. 158, 164.

[24] [1905] 2 Q.B. 730, 746; 21 T.L.R. 727.

Neville Faulks following. Conspiracy may include an agreement to do an act which is not per se criminal or tortious but is malum in se and contra bonos mores: see *Reg.* v. *Howell*,[25] *Gregory* v. *Duke of Brunswick*[26] and *Vertue* v. *Lord Clive*.[27]

As to the form of order suggested, should the appeal be allowed, see *Rex* v. *Ball*.[28]

Neil Lawson Q.C. and *Sebag Shaw* for the respondent Owen. At the material time what the respondents did was not an offence in English law (Control of Goods (Import Certificates) Order, 1951), though it was subsequently made an offence: see Strategic Goods (Control) Order, 1954. Subjects of this country are not bound by treaties unless they are incorporated in our law by municipal legislation. The creation of new offences is a matter for the legislature and not the courts. This applies a fortiori when the alleged offence is created by a statutory instrument. In criminal courts special care is taken when they are concerned with vague concepts like "public policy" and "public mischief." In criminal law conspiracy has always been a difficult area. The modern tendency is not to widen its scope. The respondents admittedly agreed to mislead Z.A.K. into granting export certificates, and the means involved the use of forged end-user certificates. Count 3 only charged a general conspiracy to defraud, not any specific acts. There was no conspiracy to defraud the German manufacturers, none of whom was called as a witness, and there was no evidence as to their state of mind. Even if Z.A.K. were deceived, they were not defrauded, because the certificates with which they parted were not related to any pecuniary obligation. Donovan J. ruled that the evidence of German law tendered by the Crown was irrelevant. But, in any event, the presumption of the similarity of German law and English law and the principle of onus of proof apply in civil, but not in criminal, cases. In bigamy cases depending on marriages in a foreign country the court does not make the assumption that the foreign marriage law is the same. It must be proved not only that there was a marriage ceremony but also that it was valid according to the law of the place where it was celebrated: see Roscoe's Criminal Evidence, 16th ed., p. 405. So also in extradition proceedings in England, the Power seeking extradition must show that the offence alleged is an offence according to its law. However, even if the presumption were relied on, it would not avail the Crown here, because, if a British Government

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[25] (1864) 4 F. & F. 160, 164.

[26] (1845) 1 C. & K. 24.

[27] (1769) 4 Burr. 2472.

[28] [1911] A.C. 47, 72.

Department were misled in a similar way, there would be no actionable wrong committed, and it is not an offence to tell lies save where it is made an offence by statute, as in the case of false declarations under the Revenue laws or in cases specified by the Defence Regulations.

In the case of conspiracy, a mere agreement made in England to perform acts abroad which may not be justifiable there does not at common law constitute an indictable conspiracy here, unless the object of the conspiracy would be indictable here, as where a conspiracy in England to commit a murder abroad is an indictable conspiracy in England.

Four propositions are relied on: (1) English criminal jurisdiction is local and, in the absence of statutory provisions, does not extend to acts committed, or intended to be committed, abroad, with the single exception of piracy jure gentium, whether such acts would constitute crimes if committed in England or by the law of the places where they are committed: see *Rafael* v. *Verelst.*[29] For the statutory exceptions, see Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., pp. 29 et seq., and section 2 of the Sexual Offences Act, 1956. So far as crimes committed abroad are concerned, they do not come within English criminal jurisdiction, because they come within the jurisdiction of the place where the crime was committed.

(2) Conspiracy per se, which is a mere agreement, is an inchoate act, a preparatory offence and, like incitement or attempt to commit a crime, acquires its criminal character from the object which it envisages, whether as means or ends, and if that object does not in itself render the act amenable to English criminal law, because it is not in fact or intention to be transacted in England, then, subject to the statutory exceptions, there is nothing to attach a criminal character to the act, so far as English law is concerned. One cannot divorce the nature of the acts from the place where they are performed, which is an essential part of their character. But where the object is the commission of an offence covered by one of the statutory exceptions, a conspiracy contemplating that object is indictable here. See also Kenny's Outlines of Criminal Law, 16th ed., p. 446, para. 645.

(3) Where the object of an agreement is the performance of an act not within the geographical scope of English criminal law, the fact that its object is the violation of the rights of a third party and, if accomplished, may give that third party a right of

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[29] (1776) 2 Wm.Bl. 1055, 1058.

action, does not make the agreement an indictable conspiracy in the absence of (*a*) disturbance of the peace here or (*b*) injury to the public here, viz., either the public at large or large classes of the public. So, for instance, an agreement to commit a trespass here would not be indictable unless the first element was present.

(4) There is no principle of public policy, detracting from the effect of the two first contentions, which requires the matters dealt with in count 3 to be an indictable offence. Although the principle of the comity of nations is part of the law of England, so that the courts here pay respect to foreign laws, they stop short of enforcing any foreign law in a positive sense, and all they do is to decline jurisdiction in relation to foreign crimes or to apply the principle of non-enforceability to civil claims in certain cases where branches of foreign law are involved. When agreements are affected by considerations of public policy, so far as validity, enforceability or criminality are concerned they must be judged from the point of view of English criminal law on economic or social institutions.

The main question is whether, when one is determining the character of acts contemplated or intended which may or may not amount to criminal conspiracy, one must look at the locality or disregard it entirely. Can the particular act involved, apart from any local connexion, be described as unlawful or must one look at the locality? As to this question, see *Mulcahy* v. *Reg.*[30] If one describes an act as criminal, one must mean that it is contrary to some law creating offences which has some local effect. Legality, in determining the criminal character of an act, must be related to the place of performance. The Crown's argument uses " unlawful " in too broad a sense. It is wrong to say in general terms that any agreement to defraud or injure a person or commit a civil wrong is an indictable conspiracy. An agreement to tell lies is not indictable. An agreement to commit a fraud, whether as means or as an end, is an indictable conspiracy only if it would be indictable as a common law fraud or cheat or as a statutory offence, such as forgery or false pretences, where the vital element is the locus of the act, or if the object is to defraud the English public or sections of it. But a simple agreement to commit a fraud not involving the public is not an indictable conspiracy unless the fraud itself is at the same time a criminal offence, or injury to a person here in his proprietary rights is contemplated: see *Dealy* v. *United States.*[31]

[30] L.R. 3 H.L. 306, 314, 317.

[31] 152 U.S. 539.

Rex v. *Walkham*[32] deals with an attempt to commit an offence. *Hyde* v. *Shine*[33] is really a venue case. As to the question of overt acts, see *People* v. *Buffum*,[34] *Ford* v. *United States*[35] and *Rex* v. *Brisac*.[36] As to *Rex* v. *Kohn*,[37] the inferences drawn from it by the Court of Criminal Appeal in this case are sound: see also the note on that authority in Roscoe's Criminal Evidence, 7th ed., pp. 244–245. But, whatever it did or did not decide, it is a thin and unsatisfactory basis for a principle. *Reg.* v. *Warburton*[38] is distinguishable. It contained a totally different element not found in the present case in that the victim of the conspiracy was here. See also Stephen's History of the Criminal Law of England, vol. II, pp. 12–13, Wright's Law of Criminal Conspiracies and Agreements, pp. 19, 73, 106n., and Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., pp. 1472, 1474.

An agreement to commit fornication has never been held to amount to an indictable conspiracy. Although it is contrary to good morals it is not against the public interest in the same way as procuring a young girl to be a prostitute. Again, if persons agree to take a short cut where there is no right of way, there is in fact a conspiracy to commit a civil trespass, but no one would say that it was indictable.

In considering, as one must, whether or not the act contemplated was lawful in the locality where it was to be performed, it cannot be presumed that it was so under the foreign law in question in the absence of evidence: see *Attorney-General for Hong Kong* v. *Kwok-a-Sing*.[39] One cannot decide whether the object of a conspiracy is unlawful in its means or its ends unless one looks at the place where those ends or those means are to be brought about. The quality of the act done depends on the place where it is committed. Here one cannot assume that the object of the conspiracy was unjustifiable in German law: see Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 431. But, even assuming that it was, the Crown's proposition still fails, for criminal jurisdiction rests on locus and the wrong, while civil jurisdiction rests on personal amenability to the jurisdiction and locus is generally immaterial. One should not enlarge criminal jurisdiction by reference to the way in which civil jurisdiction is exercised. Further, it is not right to assume that

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[32] (1908) 8 Western L.R. 857.

[33] 199 U.S. 62.

[34] (1953) 256 F. 2nd 317.

[35] (1927) 273 U.S. 593.

[36] 4 East 164.

[37] 4 F. & F. 68, 69n.

[38] L.R. 1 C.C.R. 274.

[39] (1873) L.R. 5 P.C. 179, 198–199.

Z.A.K. could have sued civilly. Such a suit in the English courts would have involved directly enforcing, contrary to all authority, a foreign fiscal revenue or economic law at the suit of a foreign State.

As to malum in se, see Halsbury's Laws of England, 3rd ed., vol. X, p. 273, para. 526, Kenny's Outlines of Criminal Law, 16th ed., p. 22, para. 17, and *Reg.* v. *Martin.*[40] There is no authority for the proposition that whether or not an indictable conspiracy exists depends on whether the object of it is malum in se or malum prohibitum. Malum in se depends on the character of the particular locality in the way of its social institutions. There are many States recognized internationally where the standards are quite different from ours. In certain non-European countries killing a human being is not regarded as malum in se. In the Malay States it is unlawful to proselytize a Muslim, and a missionary doing so would be regarded as guilty of something malum in se. Malum in se is not a safe or satisfactory basis to go on. As to the difference between things which are unlawful in the sense of being unenforceable and those which are unlawful in the sense of being indictable, see *Mogul Steamship Co. Ltd.* v. *McGregor, Gow & Co.*[41] One must be careful to particularize the sort of illegality to which one is referring. Here the unlawfulness is to be determined by the law of the place where the act is contemplated to be committed. Unlawfulness in English law means to commit a crime in England or to do something to the injury of the public in England or of a section of it. If thus looking at the locality one finds that the object of the conspiracy is not illegal according to English law, there cannot be an indictable conspiracy. Certain types of activity harmful to the public are dealt with by the criminal law, but matters of private morality not hurtful to the public are not subject to it.

As to the suggestion that this agreement was contrary to public policy, see *Foster* v. *Driscoll.*[42] Generally speaking, the English courts do not deal with crimes committed abroad, since to do so would be against the comity of nations. To extend the scope of conspiracy as suggested might give our courts unlimited jurisdiction in point of locality. This would be contrary to public policy. The concept of public mischief should be restricted on the fundamental basis of public interest in England.

[40] [1956] 2 Q.B. 272.

[41] [1892] A.C. 25, 39, 45, 46, 47, 51; 8 T.L.R. 182.

[42] [1929] 1 K.B. 470, 495–496, 510, 515, 519; 45 T.L.R. 185.

As to the presumption of the similarity of English and foreign law, if it is a necessary ingredient in the prosecution's case that something done was unlawful abroad, the Crown must call evidence to show that that was the fact. It is for the prosecution to prove the law of Western Germany, because otherwise there is a presumption that it was the same as that of England in all respects. Everyone who wants to assert the contrary must prove it. Generally such questions do not arise save in extradition cases and bigamy cases, where foreign law may be an ingredient: see *Rex* v. *Naguib*[43] and Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., pp. 1377, 1378. In the case of marriages abroad it is necessary to call evidence not only as to the ceremony but also as to its validity.

The Crown's main argument amounts to asking the House to extend the law of conspiracy. The defence is not trying to restrict the law. If the Crown was right, then people in this country who combined to get persons out of some foreign country by means of forged papers, for example, refugees from Germany between 1932 and 1939, would be guilty of an indictable conspiracy. That would be astonishing. It is not fanciful to say that a similar situation might arise in the world now. It is not satisfactory to dismiss the problem by saying that no one would think of indicting such persons.

Alexander Karmel Q.C. and *Ian Baillieu* for the respondent Seth-Smith. Three propositions are relied on: (1) The crime of conspiracy lies in making the agreement; what makes it a conspiracy is the nature or quality of the agreement. (2) In approaching the matter regard must be had only to our principles of law. Ex hypothesi the illegality of the agreement must depend on English law, because the offence alleged is against English law and, since it is not the policy of our law to enforce foreign law, one should not, in the absence of authority, hold this agreement to be a criminal conspiracy because its performance involves a breach of foreign law, even if it does involve such a breach, which has not been proved. (3) There is no precedent for the suggestion that an agreement to do something outside the territorial jurisdiction of our courts, which would be criminal if done within it, is indictable as a conspiracy.

When in Rome one should do as the Romans did, but the Crown would not even allow the Romans to do as the Romans did. It would create an embarrassing situation for our courts if the conspiracy alleged against the respondents were held to be an indictable conspiracy. Certain acts, which are criminal here, are not criminal abroad, for example, homosexuality, gaming and cock-fighting. But, on the Crown's argument, if two Frenchmen, resident in England, agreed to go to Paris to commit an act of homosexuality, they could be indicted here for conspiracy merely on the agreement. Similarly, if two Englishmen agreed here to go to a cockfight abroad, they would be indictable. Presumably the same principle would apply if two persons agreed to go to Monte Carlo for the purpose of gaming. If the Crown's argument was meant only to apply to things malum in se, that is a bad foundation, because different things are regarded as malum in se in different countries. There is no precedent to substantiate the Crown's proposition. There is no case in which the court has struck at agreements not concerned with law and order in this country. If the scope of conspiracy is to be extended, it should be extended by the legislature. If the Crown's argument here is right, the defendant in *Reg.* v. *Bernard*[44] would have been guilty of conspiracy on the facts shown, and one would have expected the prosecution to have gone straight to that charge instead of adopting the procedure which it did. Apart from statutory offences, our law does not recognize the possibility of a common law conspiracy to commit a crime abroad. The expression " unlawful " in this context must mean unlawful by our law, and a " public mischief " must be one against our own public interest as affecting the public here or a substantial part of it. If an agreement to do an act abroad which would have the character of a crime if done in England is yet not indictable as a conspiracy in England, then, a fortiori, an agreement to commit a tort abroad cannot be indictable. As to the comity of nations, that would be violated, on the Crown's argument, since nations jealously guard their right to try offences in their own territory. The comity of nations is expressed in the laws of extradition and is limited by them. The problem raised in this case is one for the legislature. In the event of legislation, there would have to be many exceptions in view of the triviality of some crimes and of the differing views of other nations as to the criminality of the same acts.

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[43] [1917] 1 K.B. 359, 361.

The Crown, in order to succeed in this appeal, must succeed on both legs of the indictment. There was no evidence of a conspiracy with intent to defraud. At the highest there was an intent to deceive, and that was not the charge. The slip of paper

[44] 1 F. & F. 240.

obtained had no value and was not a "thing." A distinction is drawn between an intent to defraud and an intent to deceive: *In re London and Globe Finance Corporation Ltd.*[45] See also sections 1 (1) and 3 of the Forgery Act, 1913. This distinction was ignored by the trial judge, whose direction to the jury was too wide. By deceit one may cause a man to act for his own benefit. We are not here concerned with any injury that Z.A.K. might have suffered, because none is alleged. Reliance is placed on what Lord Goddard C.J. said in the Court of Criminal Appeal.[46] There can be no defrauding unless there is injury, and here there is no injury. In *Rex* v. *Brailsford*[47] it appeared that obtaining a passport by false pretences was not obtaining it by fraud, and so the prosecution had to resort to the doctrine of public mischief. That case was concerned with a public mischief in this country, but here we have no concern with any public mischief in Germany. *Reg.* v. *Newland*[48] illustrates the fact that in all fraud cases the person defrauded has been deprived of something. Here Z.A.K. has not been deprived of a thing of any value, for the point is not the value of the thing obtained to the dishonest recipient but its value to the person who parted with it. In *Rex* v. *Bassey*[49] there was a monetary loss in that the Inn of Court was deprived of money which otherwise it would have obtained. That was the ratio decidendi: see Kenny's Outlines of Criminal Law, 16th ed., pp. 300–301, para. 377.

Sir Reginald Manningham-Buller Q.C., A.-G., in reply. The meaning of "intent to defraud" does not depend on the locality where the fraud is to be committed. This fraud induced Z.A.K. to adopt a course of action, to act contrary to its interests; that is to say, as a Government Department it was induced to act in a way in which it would not otherwise have done, contrary to the object for which it was established: see *Rex* v. *Brailsford.*[50] If the respondents are right, *Reg.* v. *Newland*[51] and *Rex* v. *Bassey*[52] were wrongly decided, because in them there was no financial loss proved. Both were rightly decided. To establish injury it is enough to show that a public man has been induced to act contrary to the duties of his office.

Count 3 of the indictment, charging conspiracy to defraud, refers to the place as "the City of London and elsewhere." It alleges conspiracy within the jurisdiction and does not refer to any

[45] [1903] 1 Ch. 728, 732–733.

[46] [1957] 1 Q.B. 174, 187, 192.

[47] [1905] 2 K.B. 730; 21 T.L.R. 727.

[48] [1954] 1 Q.B. 158, 163–164.

[49] 22 Cr.App.R. 160.

[50] [1905] 2 K.B. 730.

[51] [1954] 1 Q.B. 158.

[52] 22 Cr.App.R. 160.

intent to defraud in Germany. The count by itself is perfectly good and could not have been quashed before the trial began. The question is whether an offence known to English law has been disclosed.

The object of the conspiracy was to defraud Z.A.K. in Germany by getting it to issue export licences in Germany. The means employed were the false pretences and the forged documents. Conspiracy is always a matter of inference from the facts. Here the mere sending of the documents from London to Z.A.K. constituted overt acts. If a letter sent by one conspirator in London to another conspirator abroad was intercepted, conspiracy could still be established, though, if the respondents were right, the conspirators would be entitled to be acquitted on the ground that, though they intended to defraud, they were prevented. The offence cannot depend on whether the fraud succeeded. Here there was an agreement to defraud. The agreement in England was established. So were overt acts in pursuance of the agreement. So was an intent to defraud. That makes the agreement indictable, though the fraud was to be perpetrated abroad on a person outside the jurisdiction: see *Reg.* v. *Whitchurch*[53]; *Reg.* v. *Hudson*[54]; *Reg.* v. *Potter*[55]; Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 1482, and Russell on Crimes, 10th ed., vol. II, pp. 1796, 1798, 1805, 1822.

If a conspiracy, as here alleged, to defraud is found in this country, it is indictable, whether or not the acts, if carried out, would constitute ground for a substantive charge here. A conspiracy does not cease to be indictable merely because the execution of the fraud would be elsewhere, provided it is shown that there was an agreement and that it was an agreement to defraud. Although the body to be affected by the conspiracy is outside the jurisdiction, that does not make the agreement to defraud any more meritorious. It would be against the public interest that persons should conspire with impunity in England to defraud persons abroad. All that need be proved in a prosecution is a conspiracy impressed with the character of defrauding, that is, an agreement (usually a matter of inference) and an intent to defraud. Here there was an agreement in England; there were overt acts in England and the intent to defraud was clearly established. The intention of inducing Z.A.K. to act to its detriment was in fact carried out, though that is immaterial.

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[53] (1890) 24 Q.B.D. 420.

[54] (1860) Bell C.C. 263.

[55] [1953] 1 All E.R. 296; 117 J.P. 77.

The question here is: does a conspiracy to defraud cease to be an indictable conspiracy if the intention is to perpetrate a fraud on a foreigner in a foreign country? If this fraud had been intended to be perpetrated on a British authority it is clear that it would have been indictable.

A conspiracy to defraud is indictable if there is an intention to defraud, whether or not the acts contemplated constitute a crime.

Conspiracy to defraud is a common law offence and not a statutory crime. The distinction between a common law offence and a statutory crime is important. An offence under the common law is to be regarded as an offence wherever committed. The reason why such an offence, if committed abroad, is not triable here is not that it is not an offence, but for want of jurisdiction: see Coke's Institutes, III, 47. Offences such as murder, theft and fraud are mala in se and are regarded as offences wherever they are committed, although they may subsequently have been made statutory offences: see 33 Hen. 8, c. 23. This is in line with *Reg.* v. *Martin.*[56] To seek to obtain anything or to induce a course of conduct to someone else's detriment by forged documents comes into the same category as murder or theft. It is a common law offence, wherever committed. The real distinction is between malum in se and malum prohibitum. The conception of malum in se may differ from country to country, and our view of it does not depend on the view taken in other countries. It does not matter that in darkest Africa a different view may be taken. Theft is malum in se among all civilized nations and fraud is akin to theft. A conspiracy to infringe the Lord's Day Observance Act in the south of France would not be indictable, nor would a conspiracy to open a casino in France. But a conspiracy in England to commit an act of homosexuality in a place where it is not illegal would be regarded in England as malum in se, and that would be indictable. It is hard to draw the line, but fraud clearly comes within the category malum in se. There is no allegation in count 3 that a statutory criminal offence has been committed. Reliance is placed on *Foster* v. *Driscoll.*[57]

Neither the locality of the execution of the fraud nor the character of the person intended to be defrauded is of any relevance in determining the existence of a conspiracy to defraud. The existence of the intent is what matters: see section 17 (2) of the Forgery Act, 1913. All that the court need determine here in relation to count 3 is whether an agreement of the character alleged was made and whether it was impressed with an intent to defraud. The fact that the fraud was actually accomplished is almost a "red herring." Under section 13 of the Debtors Act, 1869, it is an offence to prefer creditors. This supports the general line of the Crown's argument. A fraudulent preference would be analogous to the agreement here made in this country. The conspiracy to defraud is distinct from the means employed.

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[56] [1956] 2 Q.B. 272, 285–286

[57] [1929] 1 K.B. 470, 510.

In *Reg.* v. *Kohn* [58] there was no discussion as to locality. In *Reg.* v. *Warburton* [59] nothing turned on the place where the acts were done or intended to be done. This case was approved in *Reg.* v. *Aspinall*,[60] *Reg.* v. *Whitaker* [61] and *Quinn* v. *Leathem*.[62] These cases indicate that conspiracy is wider than the respondents contend.

"Unlawful" in this context is used in its ordinary sense and comprehends the tortious. Conspiracy includes an agreement to do something tortious. But the question whether there is an indictable conspiracy cannot depend on whether or not the person against whom the conspiracy was directed could sue in our courts. Here, if this was not a conspiracy to do an act malum in se, it was at least a conspiracy to do a tortious act. One has not got to explore the hypothetical question: if the tortious act had been done to Y at X abroad, could Y have brought an action? If the character of the act agreed to is tortious it does not matter whether or not damage was in fact suffered. The conspiracy is there whether damage was suffered or not. Therefore the court is not concerned to determine whether Z.A.K. could have sued in this case. Alternatively, the right of Z.A.K. to sue depends, not on the criminal law, but on the civil law, and the civil law of Germany is assumed to be the same as English law: see Dicey's Conflict of Laws, 6th ed., p. 866.

As to conspiracy in Scottish law, see Macdonald on the Criminal Law of Scotland, 5th ed., pp. 185, 191, *Lord Advocate* v. *Jeffrey* [63] and *Lord Advocate* v. *Michael*.[64]

As to the distinction between offences created by statute and common law offences, see *Reg.* v. *Page*.[65]

Neil Lawson Q.C. as to the cases cited in reply. As to *Reg.* v. *Page*,[65] see Halsbury's Laws of England, 3rd ed., vol. X,

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[58] 4 F. & F. 68.

[59] L.R. 1 C.C.R. 274.

[60] 2 Q.B.D. 48, 59.

[61] [1914] 3 K.B. 1283, 1299.

[62] [1901] A.C. 495, 528–529.

[63] (1842) 1 Broun 337.

[64] (1842) 1 Broun 472.

[65] [1954] 1 Q.B. 170, 175; [1953] 2 All E.R. 1355.

p. 271, para. 501, and Kenny's Outlines of Criminal Law, 16th ed., p. 530, App. I. The dictum in *Quinn* v. *Leathem*[66] does not carry the matter any further than *Mulcahy* v. *Reg.*[67]

Their Lordships took time for consideration.

Jan. 29, 1957. VISCOUNT SIMONDS. My Lords, I have had the advantage of reading the opinion which is about to be delivered by my noble and learned friend, Lord Tucker, and, fully agreeing as I do with his reasoning and conclusions, I shall satisfy myself by moving that this appeal be dismissed with costs.

LORD MORTON OF HENRYTON. My Lords, I too have had the advantage of reading the opinion which is about to be delivered by my noble and learned friend, Lord Tucker, and I agree that the appeal should be dismissed for the reasons which he gives.

LORD TUCKER stated the facts and continued: My Lords, it may be convenient at this stage, before passing to the principal question raised in this appeal, to make some observations with regard to these two counts and the nature of criminal conspiracy in English law.

The Court of Criminal Appeal (the Lord Chief Justice, and Ormerod and Ashworth JJ.) in their judgment delivered by Lord Goddard observed[1]: "It is not altogether easy to appreciate "what offence it was intended to allege in count 3, as distinct "from that alleged in count 5. The evidence would seem to be "identical on both counts. Presumably, count 3 was intended "to refer to the fraudulent representations as to the destination "of the goods and to the false shipping documents used in "support, while count 5 is confined to the forged end-user "certificates subsequently produced in support of the earlier "representations. With regard to count 3 the court has felt "considerable doubt as to whether it was right to charge an "intent to defraud and not an intent to deceive." They expressed no concluded opinion on this point in view of their decision on the main question upon which the trial judge had granted his certificate of appeal, viz., as to whether a conspiracy in England to commit a crime or to effect an unlawful object abroad is indictable in this country.

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[66] [1901] A.C. 495.

[67] L.R. 3 H.L. 306.

[1] [1957] 1 Q.B. 174, 187.

A good deal of argument was directed to your Lordships on the hearing of the appeal with regard to the words "with intent "to defraud." It is, however, to be observed that in count 3, with which alone your Lordships are concerned, the words "with "intent" do not appear whereas, by contrast, in count 5 they do appear.

Whether or not the matters alleged in count 3 and the evidence adduced in support thereof are correctly described as a conspiracy to defraud, I have no doubt that they disclose a conspiracy which would be indictable here if the acts designed to be done and the object to be achieved were in this country. It is a conspiracy by unlawful means, viz., by making representations known to be false, to procure from a department of government an export licence which, but for such representations, could not have been lawfully obtained. It is an example of a conspiracy by unlawful means to achieve an object in itself lawful, i.e., the issue of an export licence. If, however, a conspiracy of this nature is aptly included in the wide category of conspiracies known as conspiracies to cheat and defraud and if it is necessary to aver and prove that the acts designed to be done or the object to be achieved will result in some person acting to his detriment, I feel little doubt that a government department so acts if it issues a licence which enables something to be done which the department is charged with the duty to prevent.

Although the count does not expressly state the locality where the fraudulent representations were to be made or the licence was to be obtained, the evidence showed, not only that the representations were in fact made in Germany and the licence was issued there, but that the circumstances were such that the conspiracy must have been one in which the representations were designed to be made in Germany and the licence obtained there. It is accordingly to be distinguished from count 5, where the crime designed to be committed was the uttering of a forged document in this country with intent to defraud, it being immaterial whether the person or persons to be defrauded were in Germany or elsewhere. Such a count is admittedly triable here.

My Lords, I will accordingly deal with count 3 on the basis that if the evidence adduced in support of it had established a conspiracy here to make false representations in this country and thereby obtain in this country a licence of this nature, it would have constituted a criminal conspiracy.

The question then remains whether the fact that the evidence disclosed a conspiracy here to make false representations in Germany and obtain a licence there renders the conspiracy one which cannot be made the subject of a criminal prosecution, and if the answer is that it is not indictable here, is that because it was not a conspiracy to commit a crime, or are all conspiracies to do acts abroad, whether criminal or only unlawful, outside the purview of the criminal courts of this country?

If such conspiracies are punishable in the criminal courts of England, it is, in any case, remarkable that in the long history of the English criminal law no case has been found in which anyone has ever been convicted of such an offence. I shall refer later to *Reg.* v. *Warburton*[2] and explain why I do not consider that this case is an exception to this general statement. The matter has, however, been the subject of discussion for many years and different views have from time to time been expressed by judges and writers of legal textbooks.

Before passing to such authorities as there are, it may be helpful to refer to some observations of R. S. Wright J. in his Law of Criminal Conspiracies and Agreements, published in 1873. At p. 80 he prefaces his conclusions by posing the question: "What is the proper place or use in the criminal law "of the mere mental act or state of agreement or concurrence; "an act or state which in itself is plainly neutral and conveys "no associated idea of praise or blame?" In attempting to answer the question he says the first step is to distinguish between (1) agreements for the commission of crimes; (2) agreements for minor offences; and (3) agreements for acts which in the absence of agreement would not be crimes or offences.

He treats the first class as being merely auxiliary to the law which creates the crime. As to agreements for minor offences, he says (at p. 83): "It is next to be considered in what manner "agreements ought to be treated when they are for offences "punishable only on summary prosecution and by minor "penalties. There is great difficulty in discovering the prin-"ciples which are here applicable; but the difficulty will be "diminished by dismissing at the outset all offences which "ought in a good penal system to be treated as crimes, but "which happen to be treated only as minor offences in any "particular penal system. These being eliminated, the remain-"ing offences consist in the production of results which, ex

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[2] (1870) L.R. 1 C.C.R. 274.

"hypothesi, are not in themselves of grave enough consequence "to be matters for indictment; and, if so, it must in general "be immaterial whether the results are produced by one person "or by two or more persons. To permit two persons to be "indicted for a conspiracy to make a slide in the street of a "town, or to catch hedge-sparrows in April, would be to destroy "that distinction between crimes and minor offences which in "every country it is held important to preserve."

In dealing with the third class, i.e., agreements for acts which in the absence of agreement would not be crimes or offences, after referring to two peculiar classes, i.e., (*a*) acts which are necessarily collective and cannot for physical reasons be committed by one person; and (*b*) certain frauds or perversions of justice which are not, but ought to be, punishable irrespective of agreement, he proceeds (p. 86): "Apart from cases falling "within one or other of these two classes, there appear to be great "theoretical objections to any general rule that agreement may "make punishable that which ought not to be punished in the "absence of agreement; for if the act is one which can be done "by a person acting alone, and when so done ought not to be "punished, it is difficult to see at what point and on what "ground criminality can be generally introduced by the fact "that two or more persons concur in the act." And in the last paragraph of the book, in summarizing his conclusions he says. with reference to this last class of agreement: "In an imperfect "system of criminal law the doctrine of criminal agreements for "acts not criminal may be of great practical value for the "punishment of persons for acts which are not, but which ought "to be, made punishable irrespectively of agreement, and "especially for some kinds of fraud; but this use of the doctrine "involves an important delegation of a legislative power in a "matter in which the exercise of such power ought to be "carefully guarded, since the legislature admits its own inability "to discover the principles on which legislation ought to "proceed."

My Lords, I have thought it right to cite these passages to show how ill-defined and uncertain were the limits of this crime in 1873, and I may add that neither subsequent judicial decision nor legislation has helped to set limits or afford more certainty. It is the law on this subject which your Lordships are now asked to expound in relation to agreements to commit crimes or other unlawful acts out of the jurisdiction in a country where criminal conspiracy is, according to the evidence given at the trial, unknown to its own law. The gist of the offence being the agreement, whether or not the object is attained, it may be asked why should it not be indictable if the object is situate abroad. I think the answer to this is that it is necessary to recognize the offence to aid in the preservation of the Queen's peace and the maintenance of law and order within the realm with which, generally speaking, the criminal law is alone concerned. Furthermore, historically it appears to be closely allied in its development to the law with regard to attempts. Sir William Holdsworth, in volume V of his History of English Law, at p. 203, dealing with conspiracy, writes as follows: "Stephen "remarks that 'conspiracy has much analogy to an attempt to "'commit a crime.' And we shall see that this analogy at this "period comes out clearly enough in the manner in which it "was treated by the Court of Star Chamber. But we have seen "that, historically, conspiracy is more closely connected with "offences against the administration of justice; and that it was "almost exclusively from this point of view that it was treated "by the medieval common law. The modern law on this "subject really springs from these two diverse yet connected "roots." After referring to the manner in which the Star Chamber punished conspiracies as well as false and malicious accusations made before itself or the Court of Chancery, he continues, at pp. 204–5, as follows: "But it is clear that under "these circumstances the element of conspiracy will tend to "evaporate. The gist of the offence will be rather the malicious "attempt to ruin another by a false charge than the conspiracy "to effect this result. It was inevitable therefore, as Stephen "has said, that conspiracy should come to be regarded as a form "of attempt to commit a wrong. It was so regarded in the "sentence given in the Star Chamber against those who "attempted to fight duels; and in the *Poulterers'* case[3] it was "ruled in the Star Chamber that the mere conspiracy, though "nothing was executed, was an offence. But, if a conspiracy "is so regarded, why restrict it to conspiracies to commit some "offence in relation to legal proceedings? The Star Chamber "acted upon this view; and just as it punished all kinds of "attempts to commit wrongful acts, so, a fortiori, it punished "all kinds of conspiracies to commit the many varied offences "punishable either by it or by the common law courts. When "the Star Chamber was abolished, the two divergent streams

[3] (1611) 9 Co.Rep. 55b, 56b.

"of doctrine which resulted from the medieval precedents and "the rules evolved in the Star Chamber, produced some very "complex developments in the law of crime and tort." As a footnote to the above he quotes (p. 205, n. 2) the following passage from Coke: "The usual commission of *oyer* and "*terminer* gives power to the commissioners to enquire etc. *de* "*omnibus coadunationibus, confoederationibus, et falsis alligan*"*tiis* . . . in these cases, before the unlawful act executed, the "law punishes the coadunation, confederacy or false alliance, "*to the end to prevent the unlawful act*" (my italics). ". . . "And in these cases the common law is a law of mercy, for it "prevents the malignant from doing mischief, and the innocent "from suffering it." (9 Co.Rep. at p. 56b.) Accepting the above as the historical basis of the crime of conspiracy, it seems to me that the whole object of making such agreements punishable is to prevent the commission of the substantive offence before it has even reached the stage of an attempt, and that it is all part and parcel of the preservation of the Queen's peace within the realm. I cannot, therefore, accept the view that the locality of the acts to be done and of the object to be attained are matters irrelevant to the criminality of the agreement.

Returning to the present case, the trial judge, in his summing-up, directed the jury as follows: "You have in particular to "accept it from me, and this is what the argument was all about "during one of the occasions when you were out, that if two "people conspire in this country to do something unlawful by "the law of this country, for example, commit a fraud, or utter "forged documents, then it is an offence even if they agree to "commit their fraud or their uttering of forged documents "abroad." After verdict and sentence and in granting a certificate of appeal, Donovan J. explained in detail his reasons for giving this direction. He said[4]: "I regard it as unlawful in "English law to defraud a foreign subject in such a way that "the foreign subject could sue the tortfeasor in this country— "which I think Z.A.K. could have done, and could still do in the "present case." I think, however, his decision was really based on broader grounds, as shown by the passage which immediately follows[5]: "Then remembering that it is the agreement which "constitutes the crime, whether the unlawful object is effected "or not, I cannot on principle see how the conspiracy constituted "by such an agreement becomes untriable here simply because

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[4] [1957] 1 Q.B. 174, 179–180.

[5] Ibid. 180.

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"the crime or tort has been committed abroad. Logic does not "compel such a conclusion. Considerations of the public weal do "not compel it either. It would be of no benefit to this country if "it became the sanctuary for conspirators, provided only that "they concluded their unlawful plots abroad. Anomalies there "may be, of course, but they exist whatever the true conclusion." In the above passage I have no doubt that the learned judge in using the words "simply because the crime or tort has been "committed abroad" meant "simply because the crime or tort "is to be committed abroad."

These observations have great force and it was on this foundation that the Attorney-General based his case before your Lordships. The Court of Criminal Appeal, after considering the authorities and pointing out that by statute certain acts are crimes punishable in England wherever committed, e.g., murder, bigamy, offences against the Foreign Enlistment Act, the Official Secrets Act and the Merchant Shipping Act, proceeded[6]: "In "our opinion the true rule is that a conspiracy to commit a crime "abroad is not indictable in this country unless the contemplated crime is one for which an indictment would lie here. "That does not mean that there must always be found a statutory provision declaring that the crime is punishable here "because if persons do acts abroad for the purpose of defrauding "someone in this country, they are indictable here and accordingly a conspiracy to do such an act would be indictable. For "instance, if two persons agreed here to stage a sham burglary "abroad in order to collect insurances from English underwriters "the conspiracy would be indictable here though the overt act "was to be done abroad, because if the plot were carried out the "obtaining or attempting to obtain the insurance money would "be clearly indictable. In the present case the plot, though "formed here, was carried out in Germany and assuming, as we "have, that Z.A.K. were defrauded and not only deceived, the "persons defrauded were Germans in Germany. In our opinion "no offence was committed in Germany for which the appellants "could have been indicted in England and consequently in our "opinion the conspiracy is not indictable."

Referring to section 4 of the Offences against the Person Act, 1861, which makes a conspiracy in this country to murder any person abroad whether within the Queen's domains or not, and whether the person is or is not a subject of the Queen, a misdemeanour punishable with a maximum of 10 years' imprisonment.

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[6] [1957] 1 Q.B. 174, 191.

the court observed that as at any rate since 33 Henry 8, c. 23, a British subject had been indictable in this country for murder committed abroad and the Offences against the Person Act, 1828, expressly provided for the trial of any of His Majesty's subjects charged in England with murder committed on land out of the United Kingdom, whether within the King's dominions or without, it followed that being an accessory to murder abroad or conspiracy to murder abroad was triable here. They were accordingly of opinion that section 4 of the Act of 1861 did not alter the common law but provided a special penalty and made it clear that such a conspiracy by anyone in this country was indictable. This reasoning was not contested before your Lordships by either side and is clearly right.

In this connexion it should perhaps be noted that further statutory recognition of conspiracies to commit crimes is to be found in the Quarter Sessions Act, 1842, the Criminal Justice Act, 1925, and the Administration of Justice (Miscellaneous Provisions) Act, 1938, whereby Courts of Quarter Sessions have jurisdiction to try (1) conspiracies to commit any offence which such court can try when committed by one person; (2) conspiracies to cheat and defraud; and (3) conspiracies to commit offences punishable on summary conviction.

My Lords, I turn now to refer to some of the authorities, but as none of them is decisive and as there is no dispute as to the essential elements of the crime if everything is to take place within the jurisdiction, I have not been able to derive a great deal of assistance therefrom. In *Reg.* v. *Bernard*[7] the defendant, an alien, was indicted as an accessory before the fact to the murder in Paris of one Nicolas Batty, who had been killed in the Orsini plot to assassinate the Emperor Napoleon III. He was charged under 9 Geo. 4, c. 31, s. 7, which provided that " if " any of His Majesty's subjects shall be charged in [this country] " with any murder . . . or with being accessory before the fact " to any murder . . . the same being . . . committed on land out of " the United Kingdom, whether within the King's dominions or " without " he might be tried here under a Special Commission. Lord Campbell in his charge to the grand jury told them that the accused, although an alien residing here, was as much amenable to this provision as a native-born subject. He was acquitted, and an indictment against him for conspiracy which had been found against him at the Central Criminal Court and removed into the Queen's Bench was not proceeded with. In the same year there is to be found reference to the case of *Reg.* v. *Tchorzewski* [8] in which the defendant was indicted for publishing in French a seditious libel justifying the attempt to murder the Emperor. The defendant having expressed his regret, the Crown was willing to accept a verdict of "Not Guilty," but Lord Campbell C.J. made the following observation at the conclusion of the proceedings [9]: "But those who find an asylum here must ever bear in "mind that while they have the protection of the law of England "they are bound to obey that law, and that they are equally "liable with the subjects of Her Majesty for any crime which "may be committed by them while they are resident within "the realm. I hope they will bear this in mind and will under-"stand that it is a crime on the part of a British subject, or for "a foreigner owing temporary allegiance to the Crown of "England, to plot and conspire for the commission of a crime "in a foreign country, or for the commission of a crime in this "country." There had, of course, been no argument on the matter and the defendant had not been charged with conspiracy.

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[7] (1858) 1 F. & F. 240.

Reg. v. *Kohn* [10] is undoubtedly the most relevant case, though it is by no means easy to determine from the report what was or was not decided expressly or by inference by Willes J. The prisoner was indicted for conspiring at Ramsgate with the owner and master and mate of a ship named the *Alma* to cast away or destroy the vessel with intent to prejudice Belgian underwriters. The prisoner was a foreigner and the ship a Prussian merchant vessel. She was loaded at Ramsgate. Six days from the date of sailing she was scuttled and sunk far from the English coast and out of the jurisdiction of the court sitting at Maidstone Assizes. Evidence of the conspiracy to which the accused was alleged to have been a party consisted of a number of statements made by him to the mate of the British vessel *Helena* by which the crew of the *Alma* had been rescued, and to a clerk to the Salvage Association of Lloyds and other persons after his arrest. He said that on the captain's orders he had cut a piece out of the side of the ship at Ramsgate and bored holes in her and then plugged the holes; later when the *Helena* was hailed he removed the plugs. He spoke to a conversation with the mate in which the latter had stated the vessel would never reach her destination and spoke of making away with her. The prisoner had then remarked: "Then you may as well sink her at once on the bar."

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[8] (1858) 8 St.Tr.N.S. 1091.

[9] Ibid. 1095.

[10] (1864) 4 F. & F. 68.

To this the mate had replied that it would be too close to land. It is clear that there was no express agreement one way or the other as to whether the vessel was to be scuttled within or without territorial waters, but she was in fact destroyed outside. On this evidence Willes J. directed the jury as follows [11]: "The "ship was a foreign ship, and she was sunk by foreigners far "from the English coast, and so out of the jurisdiction of our "courts. But the conspiracy in this country to commit the "offence is criminal by our law. And this case does not raise "the point which arose in *Reg.* v. *Bernard* [12] as to a conspiracy "limited to a criminal offence to be committed *abroad*. For "here, if the prisoner was party to the conspiracy at all, it was "not so limited, for it was clearly contemplated that the ship "might be destroyed off the bar at Ramsgate, which would be "*within* the jurisdiction. The offence of conspiracy would be "committed by any persons conspiring together to commit an "unlawful act to the prejudice or injury of others, if the "*conspiracy* was in this country, although the overt acts were "abroad. The parties who concocted the conspiracy, it is "obvious, could only have an object to prejudice or injure some "other persons. For the principal offence committed, the "destroying or casting away the vessel, the prisoner could not "be indicted in this country, as he is a foreigner, and the ship "was foreign, and the offence was committed on the high seas. "The question then is, was it agreed and consented to by and "between the prisoner and any other person at Ramsgate, that "the ship should be destroyed, whether at sea or in port? The "prisoner's confession places it beyond a doubt that he was a "party to the act of scuttling the ship; but was he a party to a "previous *conspiracy* to that end?" The jury returned a verdict of "Not Guilty." I think it is clear that Willes J. took the view that on the evidence it was not possible for the jury to find that the conspiracy was limited to scuttling on the high seas. He says in terms: "Here it was not so limited." Accordingly, it was not necessary for him to direct them as to the law applicable to a conspiracy so limited. On the other hand, if he had thought that a conspiracy limited to scuttling in territorial waters would alone have been indictable, he no doubt would have directed the jury to acquit. He left it to the jury to decide whether the prisoner was party to a conspiracy which on the evidence was one which left open where the scuttling was to take place. This he regarded as a criminal conspiracy because it was not limited to the high seas. The case is, in my opinion, therefore inconclusive as to the law with regard to conspiracies so limited.

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[11] 4 F. & F. 68, 72–73.

[12] 1 F. & F. 240.

The Court of Criminal Appeal interpreted this case as authority for the following four propositions: (1) That an alien who scuttled a foreign ship out of the jurisdiction is not indictable here; (2) that to conspire to scuttle out of the jurisdiction is not indictable; (3) to conspire to scuttle whether the ship should be within or without the jurisdiction is indictable as the ship might be scuttled in an English port or within English territorial waters; (4) that to conspire to injure persons within by doing an act out of the jurisdiction is indictable. I agree as to (1) and (3) but I do not think it is an authority for (2) and (4).

Stephen J., in referring to this case in the seventh edition of Roscoe's Criminal Evidence, at p. 244, expressed a view similar to that which I have indicated above as to what was actually decided, but added "but on principle it ought to be criminal." In his History of the Criminal Law of England, vol. II, at pp. 13 and 14, dealing with the question of conspiracies in England to commit crimes abroad (other than murder), he regards the law as unsettled and expresses the view that it is the duty of the legislature to remove all doubt by putting such conspiracies, subject to certain possible exceptions, on the same footing as crimes committed in England. *Rex* v. *Brisac*[13] was a case of conspiracy in a British ship on the high seas and turned on the question of the venue necessary to found the jurisdiction for trial at Westminster, it having been contended that the offence was only triable under the Admiralty Commission. It is accordingly of no assistance in this case. In *Reg.* v. *Warburton*[14] the defendant was indicted for conspiring with Joseph Warburton and W. H. Pepys to cheat and defraud his partner Lister. The partnership was English but part of the business was carried on at Urbigau in Saxony. The defendant had given notice for dissolution of the partnership between himself and Lister which would necessitate the taking of an account of the partnership property and its division, after payment of liabilities, between the partners. The conspiracy was by false documents and false entries in the books in Saxony to make it appear that Pepys was a creditor of the firm so that certain partnership property was to be withdrawn and handed to Pepys or otherwise abstracted and kept back for division between the defendant, Pepys and Joseph Warburton to the exclusion of Lister.

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[13] (1803) 4 East 164.

[14] L.R. 1 C.C.R. 274.

Although the fraudulent acts were to be performed abroad the ultimate taking of the account and division of the partnership property would take place in England.

No objection was raised on the ground that the fraudulent acts were to be performed abroad. The only point taken was that the fraud at that date was one which, apart from conspiracy, was neither actionable nor criminal, and therefore the conspiracy could not be criminal. It was held that the acts agreed to be done constituted a civil wrong and therefore the conspiracy was criminal. As the final act necessary to effect the fraud was to be carried out in this country on a person here, this also is a case from which I am unable to derive much assistance.

One further case must be mentioned, viz., *Reg.* v. *Whitchurch.*[15] In this case three persons, one of whom was Elizabeth Cross, were charged with conspiring to procure the abortion of the said Elizabeth Cross. The offence of administering to herself any poison or other noxious thing or unlawfully using any instrument or other means with intent to procure her abortion requires that the woman should be with child. Elizabeth Cross was in fact not pregnant. In the case, however, of persons other than the woman herself, 24 & 25 Vict. c. 100, s. 58, enacts: "and "whosoever with intent to procure the miscarriage of any woman, "whether she be or be not with child, shall unlawfully administer ". . . shall be guilty of felony." All the accused were convicted. In the case of Elizabeth Cross, Willes J., the trial judge, stated a case for the Court of Crown Cases Reserved. In it he stated his opinion that although it was not criminal for a woman not pregnant to do such acts to herself intending thereby to procure abortion which was actually impossible, it was none the less criminal in her to conspire to commit a felony (which the administration of drugs and the use of instruments would have been in her as well as in the men if she had been pregnant) because the commission of the felony was rendered impossible by circumstances unknown to her. But he went on to state his further opinion that for the woman to conspire with the men to have certain things done to her, the doing of which constituted a felony on the part of the men, was criminal, although the object to be attained, if effected by herself alone and without the help of the men, might not have been criminal. He had accordingly directed the jury, if they believed the evidence, to convict the prisoners.

The conviction was upheld, but none of the judgments indicate whether this was on the basis of the first part of Willes J.'s opinion or of the second. If either was correct, the conviction had to stand. It is true that no distinction is drawn between the two alternative bases for the judge's opinion, but I do not think this case affords a very firm ground for drawing any fundamental conclusions with regard to the law of criminal conspiracy.

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[15] (1890) 24 Q.B.D. 420; 6 T.L.R. 177.

The Attorney-General based his case principally on the contention that, the essence of the crime being the agreement, it is immaterial where it is intended to be carried out or on whom the crime or fraud is to be perpetrated. It is, he said, unnecessary to allege in the count the locality of the scene of the designed operations, while it is necessary to state the locality of the agreement to give jurisdiction to the court of trial. But, alternatively, while saying he was not concerned to show in what particular category of conspiracy the present case came, he submitted that, being a conspiracy to defraud, it came within the class of conspiracies to do acts which are mala in se and, as such, clearly criminal in their nature, irrespective of locality. He contended that acts which were criminal at common law, such as murder and theft, although subsequently made statutory offences, were to be regarded as crimes, even if, for procedural or other reasons, they were not punishable here. And in this category he sought to include " frauds." By way of illustration he cited certain passages from the judgment of Devlin J. in the recent case of *Reg.* v. *Martin.*[16]

My Lords, this argument is an attractive one and it accords to some extent with the views expressed by Wright J. in the passages already cited from his Law of Criminal Conspiracies and Agreements, where he refers more than once to acts which " ought to be " regarded as " crimes " although they may not in fact be punishable and suggests this as the test for determining whether a particular conspiracy should be regarded as criminal. But it is significant that he also considered the task of classifying the acts which would determine the criminality of conspiracy was one for the legislature.

Ideas as to what acts are mala in se vary widely in different periods of time and in different parts of the civilized world. This classification is none the less one which may still be of assistance in certain spheres of the law, but the criminal law requires the maximum degree of definition and so uncertain a test as this seems to me ill-suited for the determination of the limits of criminality in the field of conspiracy. Moreover, I think the following passage in Halsbury's Laws of England, 3rd ed., vol. X, p. 271, "A crime is an unlawful act or default which is an offence "against the public, and renders the person guilty of the act or "default liable to legal punishment," correctly defines the nature of a crime in the criminal law.

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[16] [1956] 2 Q.B. 272, 285–286; [1956] 2 All E.R. 86.

My Lords, I share the views of R. S. Wright J. and Stephen J. that the task of determining what conspiracies, if any, in this already indeterminate field are to be triable and punishable in this country when the acts planned would not themselves have been indictable here if carried out abroad is not one which is suitable for your Lordships sitting in your judicial capacity. In this connexion I would make further reference to Sir William Holdsworth. At p. 277 of volume III he wrote: "Moreover, at all periods of our history it has been far more "difficult to extend the criminal law by a process of judicial "decision than any other branch of the law. There has always "been a wholesome dread of enlarging its boundaries by anything "short of an Act of the legislature." No one has ever been convicted of such a conspiracy, and if it is in the public interest that such conspiracies should be triable and punishable here, it is, I think, for the legislature so to determine. The comity of nations can hardly require the acceptance of the Crown's contentions in the present case, having regard to the non-recognition of conspiracy as a crime in Germany. Moreover, in the field of criminal law the comity of nations can best be served by treaties of extradition.

I have reached the conclusion that the decision of the Court of Criminal Appeal that a conspiracy to commit a crime abroad is not indictable in this country unless the contemplated crime is one for which an indictment would lie here is correct, and from what I have already said it necessarily follows that a conspiracy of the nature of that charged in count 3 as proved in evidence—which, in my view, was a conspiracy to attain a lawful object by unlawful means, rather than to commit a crime—is not triable in this country, since the unlawful means and the ultimate object were both outside the jurisdiction. In so deciding I would, however, reserve for future consideration the question whether a conspiracy in this country which is wholly to be carried out abroad may not be indictable here on proof that its performance would produce a public mischief in this country or injure a person here by causing him damage abroad.

My Lords, for these reasons I would dismiss this appeal.

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My Lords, my noble and learned friend, Lord Radcliffe, who is unable to be present today, has asked me to say that he concurs in the opinion that I have just delivered.

Lord Somervell of Harrow. My Lords, I agree that this appeal should be dismissed for the reasons given by my noble and learned friend, Lord Tucker.

Appeal dismissed.

Solicitors: *Solicitor to the Board of Trade; Stikeman & Co.; Galbraith & Best.*

F. C.

JOSEPH BULLARD . . . . APPELLANT;

AND

THE QUEEN . . . . RESPONDENT.

J. C.*
1957
July 16;
Oct. 2.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF TRINIDAD AND TOBAGO.

Criminal Law—Murder—Manslaughter—Defence of self-defence rejected by jury—Issue of provocation still open on defence evidence—Onus of proof—Direction on.

Criminal Law — Summing up — Directions to jury — Onus of proof — Appropriate formula. Trinidad and Tobago.

At the trial of the appellant on a charge of murder he relied on the defences of self-defence and provocation based on his evidence of an assault on him by the deceased man. The jury rejected the defence of self-defence, and the trial judge had withdrawn the issue of provocation from the jury on the ground that the appellant's evidence had not established it. On his appeal against his conviction the Court of Criminal Appeal of Trinidad and Tobago took the view, relying on the language of Viscount Simon L.C. in *Mancini* v. *Director of Public Prosecutions* [1942] A.C. 1, at p. 9; 58 T.L.R. 25; [1941] 3 All E.R. 272, that as the appellant's story had been rejected by the jury on the issue of self-defence there was no evidence on which the issue of provocation could be based, and they dismissed the appeal:—

Held, that it could not be doubted that Viscount Simon L.C. in *Mancini's* case (*supra*) was not intending to lay down as a proposition of universal application that the same evidence which

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* *Present*: Earl Jowitt, Lord Tucker and the Rt. Hon. L. M. D. de Silva.

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had been adduced in support of an unsuccessful defence of self-defence could never be relied on, in whole or in part, as affording provocation sufficient to reduce the crime from murder to manslaughter. Conduct which could not justify might well excuse. In the present case the fact that the jury rejected the defence of self-defence did not necessarily mean that the evidence for the defence was not of such a kind that, even if not accepted in its entirety, it might not have left them in reasonable doubt whether the prosecution had discharged the onus which lay on them of proving that the killing was unprovoked—it could not be said that such a result would have been impossible. Every man on trial for murder had the right to have the issue of manslaughter left to the jury if there was any evidence on which such a verdict could be given. To deprive him of that right must of necessity constitute a grave miscarriage of justice and it was idle to speculate what verdict the jury would have reached. The verdict of guilty of murder must accordingly be set aside and the case remitted to the Court of Criminal Appeal for a verdict of manslaughter to be recorded and the appropriate sentence passed.

There is no magic formula for directing a jury that the onus of establishing guilt is always on the prosecution, but provided that on a reading of the summing-up as a whole the jury are left in no doubt where the onus lies no complaint can properly be made.

Direction suggested in *Reg.* v. *Lobell* [1957] 1 Q.B. 547, at p. 551; [1957] 1 All E.R. 734 approved.

Judgment of the Court of Criminal Appeal of Trinidad and Tobago reversed.

APPEAL (No. 12 of 1957) in forma pauperis by special leave from a judgment of the Court of Criminal Appeal of Trinidad and Tobago (Camacho, Archer and Blagden JJ.) (January 4, 1957) dismissing the appellant's appeal from his conviction of the murder of one Eugene Layne in the Supreme Court of Trinidad and Tobago (Corbin Ag.J. and a jury) (November 19, 1956).

The following facts are taken from the judgment of the Judicial Committee: The evidence for the prosecution was to the effect that the appellant was employed by Layne in the construction of a house at Corinth and at about 7 a.m. on July 23, 1956, he was following Layne about and complaining he had not been paid what was due to him. Layne said he had not the money and that the appellant would have to wait until he, Layne, returned from Usine in the afternoon. The appellant was carrying a hatchet. Layne and the appellant were walking together and when they reached the main Naparima–Mayaro road they were picked up by a car driven by a witness named Chapman, who knew Layne well and had stopped his car on seeing him standing at the roadside. The appellant got into the back seat and Layne

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into the front seat beside the driver Chapman. Before getting in the appellant said: "This man owes me $60·00 and will not "pay me my money." Layne replied: "Do not worry with that "man—he is a madman—I do not owe him any $60·00." The appellant on taking his seat placed the hatchet he was carrying on his lap.

After the car had started Layne said: "I am going to the "Usine and even if I owe you money now you are going to the "Usine for it." The appellant said: "He does not want to pay "me my money." After travelling about 100 yards further the appellant called out: "Oh God, I want my money. I want my "money." At the same time he struck Layne at the back of his head with the hatchet. Chapman pulled up the car, the appellant got out and Chapman drove straight to the police station and then took Layne to hospital. He was admitted at about 8 a.m. and died at 3.25 p.m. the same day. The post-mortem examination some 18 hours later disclosed a stitched wound over the right temporal bone and a stitched semi-circular wound at the top of the head, nearer back than front, right across the top of the head. Internally there was a depressed fracture involving the right temporal, the parietal and left temporal bone of the skull. This fracture was immediately below the wound at the top of the head. Death was due to shock and haemorrhage from the fracture of the skull. In the opinion of the medical witness the first wound was caused by the back of the hatchet. As regards the second wound, he said: "I would think the "cutting part of the hatchet would be used." In his opinion the blows were struck from behind. If the men were facing each other the first wound might have been caused by a backhanded blow. He did not think the injury at the top of the head could have been caused by a backhanded blow. He would not say it was utterly impossible, but highly unlikely. Both wounds were lacerated wounds and were caused by distinct blows. A second medical witness said that the wounds in the right temporal region as well as in the parietal region could probably be caused by the head of the hatchet.

The evidence of the appellant was as follows: On July 23, Layne owed him $160·00, and said he would give him $60·00 later. Appellant asked for $8·00 to fix his business at home. Layne said he would take him to the Usine for the $8·00. They walked peacefully to the main road, appellant carrying his hatchet and a paper bag. Chapman's car stopped and they got in. On the way appellant asked if Layne would give him the money he was wanting. Layne said: "If not what will you do?" He replied: "I will report you at the Usine." Layne said: "You "going to make me lose my work" and grabbed him by his neck and started to choke him with his left hand and cuff him with his right. Appellant picked up the hatchet and gave him two blows. He said: "I suppose it must be the back of hatchet "that struck him. I made the blows because he was strangling "me. If Layne had not held my throat I would not have hit "him with the hatchet."

In cross-examination he said: "Layne was choking me in the "car, my head was going backwards all the time as I demonstrated. My head reached the back of the seat and could not "go any further. One of Layne's feet was over the back of the "front seat and the other was resting on the front seat. Layne "gave me 12 or 14 cuffs on my ribs and face. One cuff caught "me in my jaw. It was while he was cuffing me that I swung "the two blows with the hatchet."

On that evidence counsel for the appellant relied on the defences of self-defence and provocation.

Dealing with the defence of provocation in his summing up the trial judge, after having told the jury "You must be satisfied "that the deceased died as a result of a deliberate, cruel and "brutal act committed by the accused, voluntarily, which was "intentional and unprovoked," proceeded as follows: "In some "indictments it is open to the jury to return a verdict of not "guilty of murder, but guilty of manslaughter on the ground of "provocation. As a matter of law it is my duty to direct you "that in the circumstances of this particular case that verdict is "not open to you for reasons which I shall show you later. And "since no defence of insanity has been put up, and therefore "you cannot return a verdict of guilty but insane, the only two "verdicts which will be open to you are either 'guilty of murder' "or 'not guilty at all' on the ground of self-defence."

After outlining the evidence given by the appellant, he said: "Well, that is the evidence given in chief by the accused Bullard. "In that will lie his defence. You must give due consideration "to his defence and you must give to it the weight and the "attention which you think it deserves. But I have directed "you that it will not be open to you to return a verdict of manslaughter on the ground of provocation, because it is from the "evidence that you must get the provocation if there is any. "And putting the most favourable construction on this evidence "given here on oath by the accused he has not himself told you "that what he did was a result of any provocation given him by "Layne."

A few lines later he said: "I am directing you that nowhere "in his statement, his evidence given on oath, will you find that "he committed this act because he was provoked by Layne's "refusal or failure to pay him the money. His evidence here is "that if Layne had not held my throat I would not have hit him "with the hatchet."

It was submitted at the hearing before the Board by counsel for the appellant that the trial judge was wrong in withdrawing the defence of provocation from the jury and that accordingly there had been a grave miscarriage of justice.

1957. July 15, 16. *Ralph Millner* and *J. R. Bisschop* for the appellant. The appellant's defences at the trial were (1) that he struck the blows in self-defence, and (2) that he acted under provocation—which, of course, if established, involves a verdict of manslaughter. The grounds of this appeal are, as regards self-defence, that there was a misdirection as to the burden of proof—the direction to the jury was in such a form as to leave them under the impression that the burden of establishing this defence was on the accused. On the evidence given by the appellant it was open to the jury to say that he acted in self-defence. As to provocation, the complaint is that this defence was expressly withdrawn from the jury; and the submission is that that was a misdirection because there was evidence to support that defence. The case for the Crown was that without provocation the appellant struck the deceased. English common law applies in Trinidad and no local Ordinances require to be considered. The only point considered by the Court of Criminal Appeal was provocation; the provocation aspect of this case is very close to that in *Chan Kau* v. *The Queen*,[1] which is very much in point here.

On the self-defence issue reliance is placed on *Woolmington* v. *Director of Public Prosecutions*[2]; and see also *H.M. Advocate* v. *Doherty*[3] and *Reg.* v. *Lobell*.[4] If the jury had been properly directed here it cannot be said that they would necessarily have taken the view that they did.

With regard to the judge expressly withdrawing a verdict of manslaughter from the jury, his reason—that provocation was not established—was an entirely erroneous direction, for there was here evidence of provocation. The Court of Criminal Appeal's view that, because the jury rejected the appellant's account on the issue of self-defence, there was therefore no evidence on which provocation could be based was founded on a passage from the opinion of Viscount Simon L.C. in *Mancini* v. *Director of Public Prosecutions*,[5] where he said: "The alternative case, "therefore, as to which it is suggested that a defence of "provocation was open, must be regarded on the basis that the "appellant's story was rejected." The statement of the Court of Criminal Appeal that "that is the exact position in this case" is quite erroneous. The facts are entirely different between the two cases. *Mancini's* case[5] does not support the view that blows could not be provocation for the use of a weapon such as a blunt axe. It is a matter for the jury and a question of degree. On the provocation issue all that has to be shown is that there was some evidence fit to be left to the jury. *Kwaku Mensah* v. *The King*[6] and *Rex* v. *Roberts*[7] are relied on. [*Holmes* v. *Director of Public Prosecutions*[8] was also referred to.]

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[1] [1955] A.C. 206.

[2] [1935] A.C. 462; 51 T.L.R. 446.

[3] 1954 S.L.T. 169.

[4] [1957] 1 Q.B. 547, 551; [1957] 1 All E.R. 734.

One cannot infer in the present case from the rejection of the defence of self-defence that the whole story for the defence has been rejected. It may be, taking the whole story, that, if properly directed, the jury might have said: "We reject self-"defence, but it amounts to provocation." If the appellant was being strangled, and one must assume on his evidence that he was, then it could be the view of the jury that that was provocation in the circumstances of this case. Alternatively, they might take the even more favourable view that he acted in self-defence; it was for the jury to say which of those two it was, and the main complaint is that on the facts of this case provocation was withdrawn from them.

J. G. Le Quesne for the Crown. There was not here on any view any evidence to be left to the jury on provocation. The Court of Criminal Appeal were fully justified in their approach to the matter: instead of saying that there was no evidence of provocation, they say that in view of what happened at the trial we take it that certain evidence was rejected by the jury, and if that evidence is ruled out, then no question of provocation arose. The Court of Criminal Appeal came to that conclusion on the authority of *Mancini's* case,[9] and, it is submitted, on a perfectly correct understanding of that case. But whatever happened in the Court of Criminal Appeal this Board is entitled to follow the course taken by Viscount Simon L.C. in *Mancini's* case,[9] and to say that this question must now be examined on the basis that certain evidence was rejected by the jury. Suppose that the issue of manslaughter should have been, and in fact had been, left to the jury, they rejected certain evidence and, having done so, they could not possibly have returned a verdict of manslaughter on the evidence that they did accept.

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[5] [1942] A.C. 1, 9; 58 T.L.R. 25; [1941] 3 All E.R. 272.

[6] [1946] A.C. 83; 62 T.L.R. 83.

[7] (1942) 28 Cr.App.R. 102.

[8] [1946] A.C. 588; 62 T.L.R. 466.

[9] [1942] A.C. 1, 9.

Next, even if the jury believed the appellant on every point, the submission is that there was no evidence to be left to them of such provocation as would reduce the crime to manslaughter. The law to be applied is that of England before the recent Homicide Act. It would appear to be conceded for the appellant that a mere non-payment of money could not constitute a sufficient provocation for this purpose. And the remark made about the appellant being a madman could not bring the provocation up to what is necessary to reduce murder to manslaughter. The vital evidence on this point is that of the appellant, that the deceased man turned round and attacked him. To amount to provocation the act must be such as to deprive him of self-control and make him temporarily not master of his mind. There is evidence here that in fact what happened did not have that effect on the appellant. Further, apart from the evidence of the effect on the appellant, these acts were so far from any possibility of constituting provocation that the judge was justified in withdrawing the question from the jury, and no miscarriage of justice has occurred on that ground.

With regard to the judge's charge on self-defence, reliance was placed by the appellant on *Woolmington's* case,[10] and it was said that the jury here had been told that the appellant had to establish self-defence. That criticism cannot be established; there was a fully adequate direction on the onus of proof. It is submitted that the effect of *Woolmington's* case [10] may vary from case to case. This was obviously a case in which the jury had to determine whether Layne attacked the appellant or the appellant attacked Layne; there were contradictory stories, and it was for the jury to decide which was true.

Millner replied.

July 16. EARL JOWITT. For reasons which will be stated hereafter, their Lordships will humbly advise Her Majesty that this appeal should be allowed; that the verdict of guilty of murder should be set aside; that the case should be remitted to the Court of Criminal Appeal below with a direction to record a verdict of manslaughter and to pass a sentence which seems to them appropriate for this very grave crime.

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[9] [1942] A.C. 1, 9.

[10] [1935] A.C. 462.

October 2. The reasons of their Lordships for allowing the appeal were delivered by LORD TUCKER, who stated the facts set out above and continued: It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked. See such cases as *Rex* v. *Hopper*[1] and *Kwaku Mensah* v. *The King.*[2]

In the present case it is not the non-payment of money by Layne that is relied upon as affording provocation but the assault, as described in the appellant's evidence, upon a man who on the prosecution evidence was already incensed by the non-payment and whose claim had been brushed aside by Layne with the statement that he was a madman. The non-payment alone could not, of course, have afforded any sufficient provocation. Their Lordships do not know exactly upon what counsel for the defence at the trial based his case of provocation. If it was based solely on the non-payment this may account for the language used by the judge. However this may be, the real ground as disclosed by the evidence is as indicated above, and it should have been left to the jury, whose duty it would have been to determine with what part of the hatchet the blow or blows were struck and whether the weapon used was or was not wholly disproportionate to the provocation received, and whether the story of the appellant, even if unacceptable in its entirety or somewhat exaggerated, might not have afforded sufficient provocation to excuse—though not to justify—the blows struck by the appellant. The jury might, for instance, have rejected the view that the appellant's life was ever in real peril from strangulation, yet accepted the story that he had been seized by the throat and received numerous violent blows. All these matters were for the jury and it is not in their Lordships' opinion possible, taking the view of the evidence most favourable to the appellant, to say that the issue of manslaughter could properly be withdrawn from the jury.

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[1] [1915] 2 K.B. 431, 435; 31 T.L.R. 360.

[2] [1946] A.C. 83, 93; 62 T.L.R. 83.

The Court of Criminal Appeal took the view that as the appellant's story had been rejected by the jury on the issue of self-defence there was no evidence on which the issue of provocation could be based, and in so deciding relied on the language used by Viscount Simon L.C. in his speech in *Mancini* v. *Director of Public Prosecutions* [3] as follows: "Before, therefore, "Macnaghten J.'s summing up can be criticized on the ground "that it did not deal adequately with the topic of provocation, "we have to see what was the extent of the provocation as "disclosed by the evidence which the jury had to consider, and "for this purpose we have to exclude altogether the allegation "made by the appellant that he heard the voice of Fletcher "threatening him with 'knifing,' and that Distleman came at "him with an open pen-knife in his hand. The judge had already "instructed the jury fully on these matters and had directed the "jury to acquit the appellant altogether if they felt they could "accept the appellant's story. The alternative case, therefore, "as to which it is suggested that a defence of provocation was "open, must be regarded on the basis that the appellant's story "was rejected."

This language must be considered in the context of the facts of that particular case, when it would seem true to say that once the story of the presence of a knife in Distleman's hands was rejected there was nothing left upon which to base the defence of provocation, but their Lordships have no doubt that Viscount Simon L.C. was not intending to lay down as a proposition of universal application that the same evidence which has been adduced in support of an unsuccessful defence of self-defence can never be relied upon in whole or in part as affording provocation sufficient to reduce the crime from murder to manslaughter. Conduct which cannot justify may well excuse.

In the present case the fact that the jury rejected the defence of self-defence does not necessarily mean that the evidence for the defence was not of such kind that, even if not accepted in its entirety, it might not have left them in reasonable doubt whether the prosecution had discharged the onus which lay on them of proving that the killing was unprovoked. Their Lordships do not shrink from saying that such a result would have been improbable, but they cannot say it would have been impossible. As was said by Humphreys J. in *Rex* v. *Roberts*[4]: "As for the question "whether it was open to them on the facts, counsel for the "prosecution has argued with good reason that no reasonable "jury could come to such a conclusion. The court may be "disposed to take much the same view, but it cannot delve into "the minds of the jury and say what they would have done if "the issue had been left open to them." Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached.

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[3] [1942] A.C. 1, 9; 58 T.L.R. 25; [1941] 3 All E.R. 272.

Their Lordships are accordingly of opinion that the verdict of guilty of murder cannot stand in this case.

A further objection was taken by counsel for the appellant, which was not raised in the Court of Criminal Appeal. It was said that the trial judge had misdirected the jury with regard to the onus of proof in connexion with the defence of self-defence.

Early in his summing up the judge said: "The most important direction in law which I have to give you is that the onus "of proof is always on the prosecution. It is for the Crown to "establish the guilt of the accused and never for an accused "person to establish his own innocence. You must be satisfied "by the evidence led by the prosecution that you can feel certain "of the guilt of the accused. And if you do not feel that "certainty on the evidence led by the prosecution then it is "your duty to acquit the accused."

A little later he used the words already quoted: "You must "be satisfied that the deceased died as a result of a deliberate, "cruel and brutal act committed by the accused voluntarily, "which was intentional and unprovoked."

It is said that the effect of this general direction was vitiated by the fact that later in his summing up the judge, in dealing with the respective versions of the incident in the car used the words, "so that you now have to decide whether you believe "Chapman that Layne was sitting quietly in front of the car "looking ahead of him when the accused dealt him those two "severe blows, or whether you believe Bullard that Layne had "leaned over and was strangling him in such a manner that it

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[4] (1942) 28 Cr.App.R. 102, 110; 58 T.L.R. 138; [1942] 1 All E.R. 187.

"was necessary for him to use extreme methods to defend "himself."

It is important to observe that in the very next sentence the judge said: "Bear in mind the general directions in law which "I have given you." Later on he again used a similar expression: "If you believe the evidence given by the witnesses for the "prosecution and you do not believe that evidence given by "Joseph Bullard."

Having regard to the fact that there was no dispute that the blows were struck by Bullard and that the only issue left to the jury was self-defence, their Lordships do not consider that the jury can have been left in any doubt as to the onus being throughout upon the prosecution. It would, no doubt, have been better if the judge had used language similar to that suggested by Lord Goddard C.J. in the recent case of *Reg.* v. *Lobell*[5]: "A convenient way of directing the jury is to tell them that the burden "of establishing guilt is on the prosecution, but that they must "also consider the evidence for the defence which may have "one of three results: it may convince them of the innocence "of the accused, or it may cause them to doubt, in which case "the defendant is entitled to an acquittal, or it may and some"times does strengthen the case for the prosecution." But there is no magic formula, and provided that on a reading of the summing up as a whole the jury are left in no doubt where the onus lies no complaint can properly be made.

In the result their Lordships have humbly advised Her Majesty that the appeal be allowed and the verdict of guilty of murder set aside and the case remitted to the Court of Criminal Appeal of Trinidad and Tobago with a direction to record a verdict of guilty of manslaughter and to pass sentence accordingly.

Solicitors: *T. L. Wilson & Co.; Charles Russell & Co.*

C. C.

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